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June 4, 2010

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: Sandwich Isles Communications, Inc. Petition for Declaratory Ruling  
WC Docket No. 09-133  
Ex Parte Notice

Dear Ms. Dortch:

On June 3, 2010, Albert Hee and Janeen-Ann Olds of Sandwich Isles Communications, Inc.; Walter Raheb of Roberts Raheb & Gradler LLC; Dana Frix, James Stenger, and the undersigned of Chadbourne & Parke LLP, met with Edward Lazarus and Priya Aiyar of Chairman Genachowski's office; Sharon Gillett, Marcus Maher and Jennifer Prime of the Commission's Wireline Competition Bureau; and Albert Lewis and Pamela Arluk of the Pricing Policy Division. The foregoing individuals met to discuss the positions set forth in the attached White Paper and related reference materials.

Should additional information be necessary in connection with this matter, kindly communicate directly with the undersigned.

Sincerely yours,



Megan Strand  
Counsel to Sandwich Isles Communications, Inc.

Enclosures

cc: Edward Lazarus  
Priya Aiyar  
Sharon Gillett  
Albert Lewis  
Marcus Maher  
Jennifer Prime  
Pamela Arluk

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Sandwich Isles Communications, Inc.	)	
	)	WC Docket No. 09-133
Petition for Declaratory Ruling	)	

**WHITE PAPER OF  
SANDWICH ISLES COMMUNICATIONS, INC.  
IN SUPPORT OF  
INCLUSION OF ITS UNDERSEA CABLE COSTS  
IN THE NECA POOL**

**June 3, 2010**

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**WHITE PAPER  
OF SANDWICH ISLES COMMUNICATIONS, INC.  
IN SUPPORT OF INCLUSION OF ITS  
UNDERSEA CABLE COSTS IN THE NECA POOL**

Sandwich Isles Communications, Inc. ("SIC") respectfully submits this White Paper in support of the inclusion of all of SIC's costs to lease the Paniolo submarine cable system ("Paniolo cable"), and associated expenses including engineering costs and interest paid on loans obtained in lieu of settlements due to SIC in tariff years 2009-2010, in the National Exchange Carrier Association ("NECA") traffic sensitive pool, and in support hereof respectfully shows as follows.

**I. EXECUTIVE SUMMARY**

**A. Key Considerations**

- NECA has made no valid legal argument that warrants excluding SIC's lease costs from the NECA pool. In the absence of such legal basis, all of SIC's costs should be included in the pool.
- At issue in this case is whether SIC will be compensated for leasing costs associated with construction of a modern undersea cable that SIC caused to be constructed and which interconnects SIC's fiber network on five of the Hawaiian Islands. The cable, which was placed into service in August 2009, enables advanced broadband service to and among the Hawaiian Islands.
- The specific legal issue is whether SIC's costs should be included in NECA's traffic sensitive pool. Doing so allows SIC to recover the costs of the cable from the pool, rather than from individual ratepayers, which is the purpose of the pool.
- NECA says that SIC's costs should not be included in the pool. It does not allege that specific components of the cable were costly, given its context (*i.e.*, that it is a submarine cable), or that SIC did not comply with FCC accounting rules. NECA simply challenges whether the cable is in the public interest (*i.e.*, whether it ever should have been built).
- The question of whether the cable should ever have been built has already been answered. Prior to construction the FCC concluded *three times* that (a) building SIC's network is in the public interest and (b) the cost of the network is entitled to

be included in the NECA pool. The third time the FCC did so over the objection of a competitor who argued that the undersea cable portion of SIC's network was too costly, and that SIC should lease capacity on a competitors' cable rather than build the new cable. (Note: the costs cited by the competitor exceed those actually incurred by SIC by a substantial margin.) Thus it is clear that the FCC has already concluded that construction of the undersea cable, and inclusion of its costs in the NECA pool, are in the public interest.

- In addition to relying upon the FCC's decisions, SIC relied upon Rural Utility Service ("RUS") engineering and loan approval, and even a prior conclusion by NECA that SIC's cable costs would be included in the NECA pool (provided that SIC were to comply with FCC cost accounting rules).
- Since its inception in 1984, NECA has never before asserted authority to act as a "gatekeeper" of whether network plant is in the public interest, and in fact NECA has none. Its duties are limited to tariff administration. NECA's challenge arises because of the high cost of building network in Hawaii. Hawaii is one of only two states (Alaska being the other) that require submarine cable to connect intrastate network and submarine cable is more expensive to construct than is fiber attached to existing utility poles as is done on the U.S. mainland. However, the question is not whether it costs more to construct network plant in Hawaii than in other states. The question is whether it is prudent to have constructed the cable at all, and the FCC has answered that question affirmatively on three occasions.
- NECA's position in this case unreasonably disfavors Hawaii over other states. NECA's "Trends 2009" report proudly trumpets the large amount of fiber being installed by rural LECs on the U.S. mainland and notes that carriers on the mainland "are also looking out for their customers' future needs, designing the next generation network and planning for the additional bandwidth needed to provide advanced service." Similarly, the report notes that "covering these large areas requires extensive cable and wire facilities, additional transmission equipment and innovative technologies, driv[es] up the cost per subscriber to deliver voice and high-speed broadband service... to customers."
- Yet the only state in which NECA has chosen to challenge the benefits of building an advanced network is Hawaii where submarine cable is essential to intrastate service, and only in the face of *three* FCC decisions explicitly finding the network to be in the public interest. Likewise, NECA ignores substantial FCC precedent showing the benefits of new additional submarine cable capacity.
- In lieu of paying SIC \$15 million a year, representing SIC's costs to lease the Paniolo cable, NECA has proposed paying SIC \$1.9 million a year, approximating the amount that SIC was previously paying its competitor, Hawaii Telecom, Inc. ("HTI"), to lease voice grade capacity on HTI's undersea cable. Such diminution in expected funding will result in the bankruptcy of SIC and therefore likely the bankruptcy of the owner of the Paniolo cable, which is a special purpose company existing for the sole purpose of constructing the Paniolo

cable for SIC's use. In such event, the likely acquirer of the Paniolo cable and all of SIC's terrestrial network on the Hawaiian Islands at fire sale prices, is HTI, who has opposed universal service funding for SIC on multiple occasions before the FCC. NECA and HTI are both represented by the same counsel in this proceeding.

- The FCC should immediately instruct NECA to include SIC's costs in the NECA pool so that SIC can immediately begin to recover its costs of deploying advanced network in Hawaii.

## **B. Narrative Overview**

Paniolo cable is a 48-fiber, 10 gigabit cable. It was planned in 1998–2000, was commissioned by SIC in 2007 and went into service in August 2009. SIC is its exclusive lessee. The Paniolo cable links SIC's terrestrial fiber networks on the Hawaiian Islands of Kauai, Oahu, Molokai, Maui, and the Big Island.<sup>1</sup> SIC's lease costs are currently \$15 million per year ("Lease Costs"). The Paniolo cable consists of approximately 300 miles of undersea cable that terminate at cable landing stations on each of the islands referenced above, plus approximately 75 miles of terrestrial fiber that run from the landing station on each island to points of presence on SIC's existing fiber network on each island.

Although SIC's costs are described as "lease costs," SIC has provided its cost accounting to NECA in compliance with applicable rules and case law and has accounted for the Lease Costs on an "as-if-owned" basis. This reflects Paniolo's genesis. In 2000 SIC proposed to RUS, and RUS approved for construction, the entire network described above (both terrestrial and submarine), to be constructed in phases. Over the past nine years SIC built the terrestrial portion of its network using RUS loans, and "project financed" the Paniolo cable using commercial loan

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<sup>1</sup> These territorial networks are also 48-fiber, 10 gigabit capacity. Rural LECs throughout the U.S. mainland typically install a minimum of 48 fibers, and often 96 or more.

sources. It was this overall network that the FCC determined was in the public interest when it issued its order granting SIC a study area waiver in 2005.

NECA has refused to put SIC's Lease Costs in the NECA pool and to compensate SIC for its costs. NECA has supported this action on a number of theories, which have changed from time to time. Fundamentally, NECA objects to the magnitude of the cost to construct and lease the Paniolo cable, and has sought to negotiate SIC's agreement to include lesser costs in the NECA pool. NECA asserts that SIC should only be allowed to put into the NECA pool and recover the cost of leasing just enough submarine cable capacity from a competitor to serve the existing broadband needs of the Hawaiian Homelands ("HHL"), or the HHL's needs over the next couple of years. NECA argues its position is consistent with the FCC precedent instructing what prudent investment is, utilizing the "used and useful" doctrine.

NECA's position is incorrect and should be rejected by the Commission for several reasons. First, the FCC has *three times* concluded that it is in the public interest for SIC to build its network (the last time specifically noting what is now the Paniolo cable) *and* that SIC should receive high cost funding and be included in the NECA pool. Second, the Paniolo cable was constructed at a reasonable cost, an issue not challenged by NECA. Taking these two factors into consideration, the Paniolo cable's construction is *per se* prudent and the inquiry should end.

Third, FCC rules do not permit NECA to simply question the need for new network plant and therefore exclude the cost of that network in the pool, especially when that new network was previously determined by the FCC to be in the public interest. Because NECA has no legal authority, NECA has no process for making a determination that a \$150 million utility investment is imprudent. NECA unreasonably excluded SIC's costs based upon flawed legal analysis and anecdotal information from a competitor, without legal or any other process that

could reasonably be expected to result in reasoned decision making, and this resulted in a one-page letter containing no conclusions of fact or law. The FCC rules *require* NECA, as a tariff administrator, to place SIC's costs in NECA's tariff pool and require that any interested parties challenge the lawfulness of NECA's tariff under the tariff rules.

NECA has recently conceded that a reduction in high cost support to a rural LEC based upon the particular facts of the LEC is an "adjudication" under the Administrative Procedures Act ("APA") and the FCC's own rules, and therefore likely requires a formal hearing.<sup>2</sup> Specifically, NECA has said that "no standards exist for such determinations... As a result, the Commission and interested parties might find themselves embroiled in complex 'trial type' adjudicatory procedures potentially involving cost studies, presentations by expert witnesses, cross-examinations, and other time-consuming (and expensive) processes."<sup>3</sup> Without question, the Commission should not become embroiled in such an adjudication after the Commission has already approved SIC's network in three previous decisions.

The anecdotal evidence on which NECA relied in determining whether the Lease Costs were prudent was an estimate that NECA obtained from a competitor Pacific Lightnet ("PLNI") *after* the Paniolo cable was built. In relying upon that estimate, NECA disregarded lease quotes that SIC obtained from HTI and PLNI *before* construction of the Paniolo cable, which indicated that it would cost more to lease capacity from HTI or PLNI than to construct the Paniolo cable. In contrast, the lease quote that NECA allegedly obtained after the Paniolo cable was constructed was five times less than the original lease quotes. NECA disregarded these critical facts.

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<sup>2</sup> Comments of NECA at 24, n.59, *In re High-Cost Universal Service Support*, GN Docket No. 09-51, WC Docket No. 05-337, RM-11584 (Jan. 7, 2010) ("NECA 2010 High Cost Comments").

<sup>3</sup> *Id.* at 23-24.

Fourth, the Paniolo cable is in the public interest (and is prudent and used and useful) because it provides essential, redundant and diverse submarine cable capacity for Hawaii and the HHL. There were two intrastate submarine cable systems serving Hawaii prior to the construction of the Paniolo cable, those of HTI and PLNI. The HTI cable is a 2.5 gigabit cable constructed in 1994 and now 16 years old. Although submarine cables are designed to survive for 25 years, many are taken out of service earlier because they become technologically and economically obsolete. The HTI cable was constructed with dispersion shifted fiber and, under industry standards well-known to the Commission, particularly the International Bureau, was already technologically and economically obsolete in 2008 when SIC decided to lease all of the capacity on the new Paniolo cable. The other cable in existence prior to Paniolo is the PLNI cable, a 2.5 gigabit cable constructed in 1997 and now 13 years old.

The Commission has repeatedly recognized the public interest benefits of constructing new submarine cable capacity. The very factors recognized as important in a public policy evaluation, as identified by the Commission in prior decisions such as the *TAT-10 Decision*, discussed below, are ignored by NECA. These factors include the anticipated increase in demand that will result from the availability of additional capacity with better quality at lower rates; the increase in the quality of service that results from the availability of back-up capacity and the use of new technology; the improved restoration and reliability that results from diverse routes, given that the Paniolo cable lands at different places than the HTI and PLNI cables; the technological improvements which lead to the construction of a 10 gigabit cable with single mode fiber; and the competitive benefits of adding a new cable which has driven down rates in the market, as shown by the prices obtained by NECA after construction of the Paniolo cable.

Moreover, the Commission decisions approving SIC's submarine cable are also consistent with recent joint Commission and Department of Homeland Security actions to promote diverse and redundant submarine cable capacity, as indicated in FCC correspondence regarding submarine cable system information reporting.<sup>4</sup> NECA cannot be allowed to strip Hawaii of critically valuable infrastructure. SIC's Lease Costs need to go into the NECA pool, with the understanding that SIC will be leasing capacity on the cable and generating additional revenue within a reasonable time period, thereby minimizing drain on the pool.

NECA may have concerns regarding the impact of increases in total pool costs generally, but these do not justify singling out the State of Hawaii for an extraordinary denial of Commission-approved new network construction. NECA is required to serve the public interest and that lies in following FCC rules and paying for the broadband capacity needed by Hawaii that SIC has constructed. While subsea cables may be more expensive than other fiber installations, only two states, Hawaii and Alaska, require such facilities and the U.S., via the tariff pooling mechanism; can unquestionably afford to update the broadband facilities in all 50 states, including the ones with the highest costs.

Even if NECA had authority to make such decisions, which it does not, NECA's decision is inconsistent with Commission rules and policies, including the National Broadband Plan and, most importantly, comes after the subsea cable has already been built and is in service. The Commission should follow its prior decisions and order NECA to comply with its rules and immediately place all of SIC's Lease Costs into the NECA access tariff pool.

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<sup>4</sup> See, e.g., Letter from Mark Sone, Deputy Managing Director, FCC, to Kevin Neyland, Deputy Administrator, Office of Information and Regulatory Affairs, OMB (Apr. 10, 2008) (seeking approval to request that submarine cable landing licensees voluntarily provide information regarding their system status and service restoration activities in order to support Federal government national security and emergency preparedness communications programs).

## **II. STATEMENT OF FACTS**

### **A. Development Of SIC's Network**

Comparable to Native American Tribal enclaves, the HHL areas are scattered throughout the Hawaii Islands, and over the past hundred years the Hawaiian telephone company (whether owned by the state of Hawaii or private interests) declined to provide telephone service to the HHL due to the high cost of deploying network plant.

Recognizing this, in 1992 the Hawaii Public Utilities Commission ("HPUC") initiated a proceeding to investigate the rural telephone service provided by GTE Hawaiian Telephone Company ("GTE").<sup>5</sup> In 1994, the Hawaii Legislature passed Act 80, which directed the HPUC to improve telecommunications service in rural areas by authorizing another telephone company to provide service if necessary.<sup>6</sup>

In 1995, the Department of Hawaiian Homelands ("DHHL") issued SIC's parent company a license to provide telephone service to the HHL. Based upon DHHL's determination that it would require a company other than GTE to serve the HHL, the HPUC subsequently granted SIC a certificate of public convenience and necessity in order to construct its network<sup>7</sup> and designated SIC an Eligible Telecommunications Carrier ("ETC").<sup>8</sup>

In 1998-2000, SIC planned, and obtained RUS approval for, a new incumbent local exchange network consisting of approximately 750 miles of terrestrial fiber on six Hawaiian

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<sup>5</sup> HPUC Docket 7497, Order No. 11886 (Sept. 29, 1992).

<sup>6</sup> See Hawaii Revised Statutes ("HRS") § 269-16.9(h).

<sup>7</sup> See *Application of Sandwich Isles Communications, Inc. for Authorization to Provide IntraLATA and Intrastate Telecommunications Services Within and Between Hawaiian Home Lands Throughout the State of Hawaii Pursuant to HRS Section 269-16.9*, Doc. No. 96-0026, Order No. 16078 (Nov. 14, 1997) ("SIC CPCN Order").

<sup>8</sup> Letter from Kali Watson, Chairman, Haw. Homes Commission, to Common Carrier Bureau, FCC (May 14, 1997).



Islands and 350 miles of undersea fiber connecting the terrestrial portions of SIC's network.<sup>9</sup> The proposed network, which was to be built in phases, was for the purpose of serving the HHL.

On February 18, 2000, NECA wrote to SIC to advise SIC that it had reviewed the network that had been approved by RUS. Recognizing that it would cost at least \$416 million and include undersea cable, NECA concluded that providing that SIC subsequently complies with FCC rules and NECA procedures in constructing the fiber and undersea portions of its network, then:

[b]ased upon the information shown...it is reasonable to assume that [SIC] will receive the estimated NECA settlements and High Cost Loop Fund (USF) throughout the projected period.<sup>10</sup>

Thus, NECA represented to SIC in 2000 that it was "reasonable" to assume that the submarine cable costs would be included in the NECA settlements.

**B. RUS Decision Approving The Construction And Funding Of The Terrestrial And Undersea Components Of SIC's Network And NECA's Determination In 2000 That The Undersea Cable Costs Should Be Put In The NECA Pool**

SIC has been awarded RUS loans since 1997, when RUS approved SIC's "A" Loan for \$27,682,050 on September 4, 1997. The A Loan provided for the construction of infrastructure to serve HHL areas on the island of Oahu. On January 12, 1999, RUS approved SIC's "B" Loan application for \$41,581,700 to construct new telecommunications facilities for the HHL areas on the "neighbor islands" of Kauai, Maui, Molokai, and the Big Island.<sup>11</sup> In implementing the infrastructure funded by the A and B Loans, SIC was dependent upon leased facilities from then-

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<sup>9</sup> See Letter from Ken Chandler, Southwest Area Director, RUS, to Albert Hee, President, SIC (Nov. 30, 2000).

<sup>10</sup> Letter from Susan Barrett, Director-Pacific Region, NECA, to Judi Ushio, Manager, Finance and Administration, SIC (Feb. 18, 2000).

<sup>11</sup> Mid-State Consultants, "RUS Loan Application For Sandwich Isles Communications, Inc. Hawaii 501-E Vol. I – Engineering Information" (Feb. 24, 2009) ("RUS Supplemental Loan Application").

existing Verizon Hawaii (now HTI). Such an arrangement, however, was insufficient in terms of capacity and quality, preventing the level of service necessary for SIC to fulfill the requirements of its DHHL license.<sup>12</sup>

In October 1999, a statewide transport network was proposed to RUS via SIC's "C" Loan application, and approved by RUS on November 30, 2000. The project cost approved by RUS totaled \$338,395,400. Of that, \$97,485,400 was provided through the "C" Loan from RUS. The remaining amount would be provided through supplemental RUS loans.<sup>13</sup> This RUS "C" Loan included the construction of facilities outside of DHHL lands to connect SIC service areas with a fiber optic network, including an undersea cable consisting of 48-fiber cables.<sup>14</sup> Construction of the backbone infrastructure began in 2000 upon RUS's approval of funding for the network.<sup>15</sup>

To date, SIC has borrowed nearly \$100 million of the original "C" Loan commitment from RUS. After the FCC's revocation of SIC's study area waiver, discussed below, RUS withdrew its funding on December 3, 2002, based in part on uncertainty surrounding SIC's future customer base.<sup>16</sup> SIC ultimately obtained private financing to complete the undersea cable portion of the system contemplated under the "C" Loan.

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<sup>12</sup> RUS Supplemental Loan Application, *supra* note 11.

<sup>13</sup> Letter from Ken Chandler, Southwest Area Director, RUS, to Albert Hee, President, SIC (Nov. 30, 2000). This letter was a follow-up to a prior letter in which RUS extended preliminary approval of the project costs. *See* Letter from Ken Chandler, Southwest Area Director, RUS, to Albert Hee, President, SIC (Sept. 29, 2000).

<sup>14</sup> Letter from Alan Pedersen, General Manager, SIC, to Carol Brennan, Vice President, NECA (May 7, 2008).

<sup>15</sup> Letter from David Cosson, Counsel to SIC, to Marlene Dortch, Secretary, FCC (Apr. 25, 2005).

<sup>16</sup> Letter from Jonathan Claffey, RUS, to Albert Hee, President, SIC (Dec. 3, 2002).

**C. NECA-SIC Correspondence Preceding The Use Of Private Capital To Construct SIC's Undersea Cable**

After RUS's revocation of its funding commitment, SIC ultimately entered into arrangements with the Paniolo Cable Company, LLC ("Paniolo Cable Co."), who agreed to build SIC's undersea cable in exchange for an exclusive lease from SIC that would pay for the development and construction costs. In order for Paniolo Cable Co. to secure financing, SIC agreed to lease the entire cost and be responsible for its maintenance. The undersea cable plant that was ultimately constructed was virtually the same as approved by RUS in SIC's "C" loan application.

SIC and NECA engaged in detailed correspondence in 2007 regarding the proposed construction and leasing arrangements.<sup>17</sup> The cost accounting performed by SIC is consistent with NECA Separations Cost Issue 2.19 ("Cost Issue 2.19").<sup>18</sup> NECA has not and does not dispute that the accounting treatment of the Paniolo lease conforms to the instructions and requirements of Cost Issue 2.19 and other FCC rules. NECA's main assertion is that SIC could have obtained capacity on other cables.

The lease arrangements between Paniolo and SIC called for SIC to begin quarterly lease payments in August 2009. Initially, SIC's quarterly lease payments are \$3.75 million or \$15 million per year. SIC's payments service the construction debt. If SIC defaults on its obligations, Paniolo Cable Co. will likewise default on its obligations, as Paniolo Cable Co.'s only source of revenue are SIC's lease payments. Recognizing that SIC's utilization of the cable

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<sup>17</sup> See, e.g., Emails between Alan Pedersen, General Manager, SIC, and Susan Barrett, Director-Pacific Region, and Barbara McCarron, Member Service Manager, NECA (Jun. 28, 2007).

<sup>18</sup> NECA Cost Issue Manual, Issue 2.19 (Oct. 2003).

capacity would increase over time, Paniolo Cable Co. and SIC agreed that SIC's rent increases over time, but the net cost to SIC should decline as SIC leases capacity to third parties.

**D. SIC Completes Construction Of The Submarine Cable And Requests Inclusion Of The Cost In The NECA Pool**

Prior to completion of the Paniolo cable in February 2009, there were two intrastate submarine cables serving Hawaii, one owned by HTI and the other owned by PLNI, now Wavecom. Both are 2.5 gigabit cables, a cable capacity that was commonplace when those cables were constructed in 1994 and 1997, respectively, but which predates more modern cables that typically are now constructed with 10 gigabit capacity. The useful life of a submarine cable is about 25 years. In some cases, however, cables become technologically and therefore economically obsolete, and are taken out of service earlier. The HTI cable was constructed with dispersion-shifted fiber, meaning that the division of the fiber into wavelengths (or waves) is done by the physical capacity of the cable. More modern cables use single mode fiber and the division into wavelengths is accomplished by the electronics on the ends of the cable. Modern electronics do not work well with dispersion-shifted fiber and as a result, the HTI cable effectively is obsolete. The PLNI cable uses somewhat more modern technology than the HTI cable, but nevertheless the PLNI cable is 13 years old and only 2.5 gigabits.

The construction of the Paniolo cable added an intrastate cable with 48 single mode fibers and an initial 10 gigabit capacity that is capable of being upgraded by the substitution of higher capacity electronics as needed. Such a 48-fiber, 10 gigabit cable was in line with submarine cable industry trends and is generally the same 48-fiber capacity that SIC has installed on the terrestrial portion of its network on the Hawaiian Islands.<sup>19</sup> The Paniolo cable also is consistent

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<sup>19</sup> This is also consistent with the 48-fiber capacity being installed by rural LECs on the U.S. mainland.

with submarine cable industry practices which dictate that multiple cables are needed to provide redundancy and back-up capacity due to the risk of a cable being cut or damaged and taking significant time to repair, a particularly difficult problem in Hawaii where the adjacent ocean is almost 2 miles deep. By landing in different places than the two cables, the Paniolo cable creates a diverse and redundant communications path.

SIC began testing the Paniolo cable in February 2009 and it became operational in August 2009. SIC submitted its costs to NECA and NECA included them in its 2009 tariff, and then reversed its position as discussed below.

**E. NECA's Denial Letter**

On May 5, 2009, NECA informed SIC that it would "not accept the pooling of [SIC's] anticipated costs including, but not limited to, the lease of undersea cable capacity."<sup>20</sup> After accumulating background information from SIC about the Paniolo cable, NECA rested its denial on vague and ultimately unsubstantiated concerns over "the complex contractual relationships involved" in the transaction and cost issues.<sup>21</sup>

NECA's single page denial letter states that "NECA has a responsibility to ensure all pool members comply with FCC rules," but did not allege that SIC was in violation of any (i) federal or state statutes, (ii) FCC rules or regulations or (iii) the contract between NECA and SIC. Nor did it allege that SIC had not incurred the lease expenses. The letter simply stated that NECA had "serious concerns" about the extent of the costs of the undersea cable and SIC's decision to "report those costs to the NECA traffic sensitive pool." NECA's letter does not identify any authority under which NECA was authorized to exclude SIC's costs from the NECA pool.

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<sup>20</sup> Letter from James Frame, Vice President, NECA, to Alan Pedersen, General Manager, SIC (May 5, 2009).

<sup>21</sup> *Id.*

Although the letter does not identify any rules violated by SIC, it does say that it is concerned with the following (the bullet points below are exactly as in the letter):

- the relative costs of this capacity compared to projected demand;
- the complex contractual relationships involved in this transaction;
- and the relative cost per mile compared to other undersea facilities.<sup>22</sup>

NECA also states that "it does not appear" that SIC's Lease Costs "meet the standards of the "used and useful" doctrine "and the associated prudent expenditure standard." Presumably (although it is not articulated) the bases for this conclusion are NECA's three bulleted points. In short, NECA took it upon itself to make a prudence determination without (a) identifying its authority to make the prudence standard, (b) identifying a prudence standard, or (c) identifying how SIC has violated the prudence standard.

NECA has proposed to allow SIC to include only \$1.9 million a year in the NECA pool even though SIC's Lease Costs are currently \$15 million per year. This represents the approximate amount that SIC was paying to HTI to lease capacity on HTI's submarine cable prior to the Paniolo cable becoming operational. As SIC now has contractual obligations of \$15 million not \$1.9 million, NECA's position will force SIC (and likely Paniolo Cable Co.) into bankruptcy.

### **III. STATEMENT OF PROCEEDINGS**

On June 26, 2009, SIC filed a Petition for Declaratory Ruling ("Petition") with the FCC, asking the Commission to find and declare that:

- The SIC lease costs are used and useful in the provision of interstate service;
- NECA be directed to accept the costs for pooling and settlement purposes;

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<sup>22</sup> Letter from James Frame, Vice President, NECA, to Alan Pedersen, General Manager, SIC (May 5, 2009).

- NECA pay SIC for the Lease Costs pending resolution of the proceeding.<sup>23</sup>

The Alaska Telephone Association ("ATA") submitted comments in support of the Petition on August 12, 2009. As most of its members are similarly situated to SIC in terms of providing service to small, remote communities, ATA emphasized that:

Dependable transport is imperative. That transport is costly is due to the conditions of construction ... [and is] expensive per capita... [for] it is the very isolation of these communities and the limited services available that makes communications access particularly vital.<sup>24</sup>

On August 31, 2009, comments in support of the Petition were submitted by GVNW Consulting ("GVNW").<sup>25</sup> GVNW noted that the pooling option was developed specifically for high-cost carriers such as SIC. Additionally, a decision to deny SIC's funding request would be contrary to the Commission's emphasis on infrastructure deployment, especially in light of the fact that "facilities must be placed not only where they are currently needed, but where they will be needed to satisfy future service obligations expected over the life of the asset."<sup>26</sup> GVNW also characterized NECA's decision to exclude the Lease Costs (allegedly because the Paniolo cable was not "used and useful") as arbitrary and without factual support. GVNW argued that local-based authorities, *e.g.*, HPUC, are better suited to analyze the prudence of a given investment vis-à-vis "an administrative group in New Jersey" (*i.e.*, NECA).<sup>27</sup>

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<sup>23</sup> Sandwich Isles Communications, Inc., Petition for Declaratory Ruling, WC Docket No. 09-133 (Jun. 26, 2009) ("Petition").

<sup>24</sup> Comments of the Alaska Telephone Association In Support of the Petition for Declaratory Ruling by Sandwich Isles Communications, Inc., WC Docket No. 09-133 (Aug. 12, 2009) ("ATA Comments").

<sup>25</sup> Comments of GVNW Consulting, Inc., WC Docket No. 09-133 (Aug. 31, 2009). GVNW Consulting is a firm focused on the needs of small rural independent telephone companies with regard to economic and regulatory issues.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 16.

**A. NECA's Initial Comments**

NECA filed fairly extensive comments in response to the Petition on August 31, 2009.

Therein NECA provides a qualified and generalized conclusion:

While NECA fully supports the provision of advanced services in rural areas, it could not support Sandwich Isles decision to lease, in its entirety, a cable transportation network to serve its regulated customer base. This decision was based on the fact that the lease was made at an extraordinary high cost relative to the number of subscribers, which appears inconsistent with the Commission's longstanding 'used and useful' standard, especially given the availability of more reasonable alternatives.<sup>28</sup>

Most of NECA's comments are devoted to background, noting that the FCC has, in select circumstances, considered the reasonableness of plant investment, and where it did so it used a totality of the circumstances test.<sup>29</sup> NECA's analysis of why SIC's decision to cause the construction of the Paniolo cable was apparently unreasonable to NECA is limited to one short section, the thrust of which is that "NECA has serious concerns about the scale of this project based on the size" of SIC's customer base,<sup>30</sup> and that "the inclusion of the entire costs of the cable lease represents excess or imprudent investment."<sup>31</sup> NECA states that "the FCC is strict concerning investment in excess capacity, and only allows investment to be included in the rate base if it will be put in service within a reasonable time or constitutes reasonable spare capacity" and that SIC has not "adequately demonstrated" a reasonable likelihood that it will place all its leased capacity into service for the benefit of [SIC's] subscribers within such time."<sup>32</sup> NECA

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<sup>28</sup> Comments of NECA at 2, WC Docket No. 09-133 (Aug. 31, 2009) ("NECA Comments").

<sup>29</sup> *Id.* at 17.

<sup>30</sup> *Id.* at 19.

<sup>31</sup> *Id.* at 20.

<sup>32</sup> *Id.* at 20-21 (citing a 1977 FCC decision regarding regulation of AT&T's rates, which predates the FCC's current blanket 214 authorization regime). NECA implies that network plant which is not put in full use within two years is imprudent, which is seemingly inconsistent with the recognition that

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notes that SIC has voiced concerns that the undersea cables owned by its competitors have "service quality and reliability issues," but "NECA is not in a position to comment on the technical details of" SIC's concerns.<sup>33</sup> NECA ends its comments on a very qualified note, stating that "[i]f the capacity available from Hawaiian Telco or Pacific Lightnet or a combination of the two is more cost effective than leasing the entire Paniolo cable and is sufficient to provide service to the limited number of [SIC] subscribers for the foreseeable future, it would seem more reasonable to explore those options in greater detail...." Lastly, NECA recognizes that it is approximating the situation:

It is difficult to determine what portion of the new lease is 'Used and Useful.' Given the situation, NECA would likely turn to the costs of the alternative facilities to estimate what would be "Used and Useful." However, as noted in these comments, NECA is willing to view new data demonstrating that other amounts should properly be included in the rate based under FCC rules.<sup>34</sup>

Importantly, NECA omits any discussion of the three FCC orders finding that the development of SIC's network is in the public interest, and therefore does not explain why NECA's "concerns" trump the FCC's prior conclusions to the opposite effect. NECA also omits any discussion of whether it has applied the "used and useful" test to fiber network deployments on the U.S. mainland.

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carriers need to install vast quantities of fiber because of an expected explosion in bandwidth demand. Compare NECA Comments at 16 with NECA's "Trends 2009" report, discussed in Section I.A, *supra*.

<sup>33</sup> NECA Comments, *supra* note 28, at 22.

<sup>34</sup> *Id.* at 23 n.76.

**B. Other Comments**

Verizon and HTI also filed comments on August 31st, alleging that the Petition contained erroneous and insufficient factual information.<sup>35</sup> In particular, Verizon argued that the Petition was "woefully insufficient for interested parties to offer meaningful comment."<sup>36</sup> Nonetheless, Verizon continued with its analysis, citing to the per line costs of SIC's existing network in the context of a "used and useful" analysis, stopping short of actually concluding that based on these figures the Paniolo cable was not "used and useful." Instead, Verizon concluded that given "NECA's deferential approach to member cost submissions, the Commission should be wary of reversing any decision by NECA to reject a pool participant's proposed cost data absent clear evidence of error."<sup>37</sup>

HTI stated that it took "no position on the relief requested by [SIC]", and that the purpose of its comments was to correct several "unsupported" statements in the Petition. HTI clarified generally that:

- It has sufficient capacity to meet SIC's needs on all HTI inter-island facilities;
- It provides high quality service with redundancy and minimal downtime at reasonable prices;
- Its bankruptcy proceeding has not affected the availability or quality of HTI's services.

Although HTI phrased its comments as "an opportunity to correct inaccuracies in the record", it did not describe either the type of arrangements in place to ensure reliability of its service or identify the "other providers" that were supplying redundant capacity.

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<sup>35</sup> Comments of Hawaiian Telcom, Inc., WC Docket No. 09-133 (Aug. 31, 2009) ("HTI Comments"). Note that the HTI Comments were submitted by the Law Offices of Gregory Vogt, PLLC, who is also representing NECA in this proceeding.

<sup>36</sup> Comments of Verizon, WC Docket No. 09-133 (Aug. 31, 2009).

<sup>37</sup> *Id.* at 3.

In response to the foregoing comments, on September 10, 2009, SIC, NECA, and HTI submitted reply comments that essentially mirrored their prior filings. Additionally, AT&T filed reply comments, which concurred with NECA's analysis and conclusion that the high cost per subscriber and availability of alternatives to constructing a new cable rendered SIC's investment neither used nor useful.<sup>38</sup>

On September 15, 2009, the DHHL submitted a letter to the Commission to provide additional information on the DHHL's commitment to award leases and develop homes in the HHL. The DHHL noted that there were more than 20,000 applicants awaiting leases and that the DHHL had set a goal of awarding 5,000 homestead lease awards in the five years from 2007-2011.<sup>39</sup> DHHL closed by explaining that the resources and opportunities provided by SIC enabled the DHHL to "sustain development of additional homestead subdivisions and accelerate delivery of more affordable homes. Laying the foundation [that] now allows [DHHL] greater flexibility and mobility to develop" in the future.<sup>40</sup>

#### **IV. ARGUMENT**

The Commission has thrice approved waivers for SIC with the express understanding that SIC would construct its intrastate network linking the HHL on the various Hawaiian Islands and that SIC would participate in the USF program and include its cost in the NECA access tariff pool. These three decisions are consistent with prior Commission case law concerning submarine cables, such as the TAT-10 cable, where the Commission has outlined the factors to be considered, each of which is met with regard to the Paniolo cable. NECA has no authority to

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<sup>38</sup> Reply Comments of AT&T, WC Docket No. 09-133 (Sept. 10, 2009).

<sup>39</sup> Letter from Kaulana Park, Chairman, Haw. Homes Commission, to Julius Genachowski, Chairman, FCC (Sept. 15, 2009) at 2.

<sup>40</sup> *Id.*

overturn the prior Commission decisions in the SIC study waiver cases and with regard to submarine cables generally. NECA was arbitrary and capricious in that it ignored the three Commission decisions finding SIC's network in the public interest, related Commission policies and NECA's own pronouncements on behalf of other rural carriers, and failed to obtain unbiased advice of counsel, given its use of HTI's counsel while HTI is also a party to this case.

**A. The Commission Has Already Issued Three Decisions Finding That SIC's Network Including The Costs of Paniolo Cable Should Be Put In The NECA Pool**

The controlling fact in this case is that in three decisions in 1998, 2004 and 2005, the Commission determined that it is in the public interest for (1) SIC to construct its network, and in doing so, (2) to participate in and obtain the benefits of the USF high costs subsidy arrangements and (3) to put its cost in the NECA access tariff pool.<sup>41</sup> In the third of those decisions the Commission made these public interest determinations with regard to the very submarine cable at issue in this case. In short, the dispute in this case arises only because NECA has simply disregarded these Commission findings.

By way of background, on July 8, 1997, SIC filed a petition requesting waiver of certain of the Commission's rules to enable it to receive high cost loop support for its network. In order to participate in high cost support mechanisms, SIC also requested waiver, to the extent necessary, of the definition of "incumbent LEC." In approving this petition, the Accounting and Audits Division of the Common Carrier Bureau ("Bureau") concluded that:

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<sup>41</sup> See Order, *In re Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification*, 13 F.C.C.R. 2407 (Feb. 3, 1998) ("1998 Waiver Case"); Memorandum Opinion and Order, *In re GTE Hawaiian Telephone Company*, 19 F.C.C.R. 22268 (2004) ("GTE Hawaiian Telephone"); Order, *In re Sandwich Isles Communications, Inc. Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary and Sections 36.622, and 69.2(hh) of the Commission's Rules*, 20 F.C.C.R. 8999, ¶ 1 (2005) ("FCC 2005 Waiver Decision").

We ... find it reasonable that Sandwich Isles participate in NECA pools and tariffs. Participation in NECA will allow Sandwich Isles to avoid the costs of filing and maintaining its own company specific interstate tariffs. The cost of preparing company-specific tariffs could be excessive for a company with relatively few customers. In addition, because Sandwich Isles plans to make large capital investments to initiate service, its company-specific rate would likely be extremely high. Therefore it is in the public interest to permit Sandwich Isles and its potential customers to benefit from both the cost savings and lower rates available through NECA participation.<sup>42</sup>

In short, the Bureau explicitly concluded that it is in the public interest for SIC to include its reasonable costs in the NECA pool, recognizing that SIC was engaging in the development of a costly, capital intensive network.

GTE, the dominant local exchange carrier (now HTI), opposed the SIC petition, but GTE's late filed comments were rejected by the Commission,<sup>43</sup> and GTE appealed the Bureau's waiver grant to the full Commission.

Upon review, the Commission granted HTI's appeal, concluding that the Bureau erred in ignoring evidence that some of the area to be served by SIC was being served by HTI. As a result, the Commission *ordered* SIC to "seek and obtain a study waiver in order to be treated as an incumbent LEC for purposes of receiving universal service support."<sup>44</sup> In so finding the Commission reaffirmed its support for SIC's public policy mandate even in the face of high costs:

[T]he designation of Sandwich Isles as eligible for support for serving the Hawaiian Home Lands resulted in the creation of a 'high-cost' area that was previously within the study area of GTE in the state of Hawaii. The creation of a new study area has the effect of placing a new burden on the federal universal service fund. By

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<sup>42</sup> *1998 Waiver Case*, *supra* note 41, at ¶ 13.

<sup>43</sup> *Id.* at ¶ 16.

<sup>44</sup> *GTE Hawaiian Telephone*, *supra* note 41, at ¶ 1. In adopting this holding, the Commission provided SIC with a roadmap for overcoming an additional procedural hurdle to SIC obtaining the benefit of the various high cost support mechanisms, including loop support and participation in the NECA pool.

requiring Sandwich Isles to seek a study area waiver, the Commission will have the opportunity to consider whether creating a high-cost study area in Hawaii would have an adverse effect on the universal service fund and whether or not it would serve the public interest.<sup>45</sup>

Thereafter, on December 27, 2004, SIC filed a petition satisfying the Commission's instructions.<sup>46</sup> SIC's petition indicated that SIC had incurred costs of approximately \$166 million to date and that construction was continuing, including construction related to what is now referred to as the Paniolo cable:

Sandwich Isles's long-range plans, and the requirement of its License, is to provide local service and high-speed connectivity to all HHL communities, and to link all the communities together. Accordingly, Sandwich Isles is presently constructing a fiber network to connect its service areas on the 6 islands, which will permit the delivery of the basic level of telephone service promised by Congress in the 1934 and 1996 Communications Acts.<sup>47</sup>

Any question as to whether the Commission was fully aware of SIC's construction plans, including plans to construct the Paniolo cable, were eliminated by HTI who viewed SIC as a competitor. In its comments in the proceeding HTI banged the table in claiming that SIC's network, both current and planned, did not serve the public interest, precisely because of its

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<sup>45</sup> *GTE Hawaiian Telephone*, *supra* note 41, at n.9. Please recall that the Commission's primary objective in freezing study area boundaries was to prohibit companies from setting up high-cost exchanges within existing service territories as separate study areas in order to maximize high-cost support. The creation of a new study area has the effect of placing a new burden on the federal universal service fund. Accordingly, the Commission clarified that a study area waiver request must be filed with the Commission where a company is seeking to create a new study area from within one or more existing study areas.

<sup>46</sup> *Sandwich Isles Communications, Inc., Petition for Waiver of the Definition of 'Study Area' Contained in Part 36, Appendix-Glossary and Sections 36.611, and 69.2(hh) of the Commission's Rules*, CC Docket No. 96-45 (Dec. 27, 2004).

<sup>47</sup> *Id.* at 20.

adverse effect on the high cost subsidy mechanisms, based both upon existing construction and the increase resulting from SIC's future plans.<sup>48</sup>

Importantly, HTI's arguments then were the same as NECA's today, that it is not in public interest to support SIC's construction of its network when HTI is standing nearby and ready to serve, possibly even at a lower cost:

[T]o the extent high-cost funding is necessary to provide the level of service desired in the HHL, it is not clear why SIC should have exclusive standing to seek that funding. It is quite plausible that long-established Verizon-Hawaii could make an equally compelling case for the funding, pursuant to its own petition for a study area waiver. Moreover, Verizon Hawaii would likely be able to do so at lesser cost to the public, since Verizon Hawaii undoubtedly has a more extensive existing network.<sup>49</sup>

HTI also made the argument that SIC's costs were too high in absolute terms for SIC to participate in high cost funding mechanisms, including the NECA pool:

If the Commission grants the petition, it merely will supplant one carrier with another, potentially higher-cost alternative, which could impose an undue burden on the fund. The Commission should explore whether, with costs of \$13,000 per line, SIC is the service provider best able to maximize the use of high-cost support for the public benefit.<sup>50</sup>

Like NECA, HTI also argued by insinuation. It argued that the Commission should undertake a special investigation to explore whether SIC is using high-cost support for its intended purposes. Specifically, HTI argued:

It appears to be general knowledge that the \$500 million telecommunications system [being built by SIC] has much greater capacity than may ever be required by HHL residents, and that it is highly unprofitable for SIC to use its facilities to provide service only to HHL residents.<sup>51</sup>

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<sup>48</sup> Comments of Hawaiian Telcom MergerSub, Inc. at 7, *In re Petition for Waiver of the Definition of 'Study Area' Contained in Part 36, Appendix-Glossary and Sections 36.611, and 69.2(hh) of the Commission's Rules*, CC Docket No. 96-45 (Feb. 8, 2005) ("HTI MergerSub Comments").

<sup>49</sup> *Id.* at 9.

<sup>50</sup> *Id.* at 10.

<sup>51</sup> *Id.* at 12.

And:

Notwithstanding the pending reconsideration Petition, SIC pursued RUS loans and spent money on a HHL network in apparent confidence that the federal high-cost fund would pick up the tab. SIC's business plan appears to consist of combining high-cost support with access revenues to fund a half billion dollar telecommunications venture what will be used by only a few thousand people....<sup>52</sup>

In the end, however, the Commission bluntly disagreed with HTI (just as it must with NECA today):

We...grant Sandwich Isle's a waiver of the definition of incumbent LEC in part 36 and in section 54.5 of the Commission's rules to the limited extent necessary to permit Sandwich Isles to receive universal service support based upon its own costs. *These waivers will permit Sandwich Isles to continue being treated as an incumbent LEC for purpose of receiving universal service support and participating in the National Exchange Carrier Association (NECA) tariffs and pools.*<sup>53</sup>

In so finding, the Commission repudiated HTI's arguments that SIC's costs were unreasonably high.<sup>54</sup> The Commission also found SIC's network, including the Paniolo cable to be in the public interest. We take the liberty of quoting at length:

**Public Interest Analysis.** The public interest is served by a waiver of the study area freeze rule to recognize Sandwich Isles' service territory on the Hawaiian home lands as a study area for regulatory purposes because of the significant investment to provide service in areas and to customers that did not previously have service. According to the most recent information filed with the Commission, Sandwich Isles currently has telecommunications facilities passing 4,300 lots on the Hawaiian home lands and expects to pass another 1,500 lots over the next two years. Sandwich Isles expects to have approximately 1,700 subscribers by the end of this year, and approximately 4,600 subscribers by the end of 2009. Sandwich Isles' construction schedule involves deploying backbone switching and transport infrastructure as well as local distribution facilities to serve the residents of the Hawaiian home lands. Construction of backbone infrastructure began in earnest in 2000, with RUS approval of funding for a comprehensive network design that will connect all of the

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<sup>52</sup> HTI MergerSub Comments, *supra* note 48, at 16.

<sup>53</sup> *FCC 2005 Waiver Decision*, *supra* note 41, at ¶ 1 (emphasis added).

<sup>54</sup> *Id.* at ¶ 16 (stating that the Commission "conclude[d] that the universal service fund will not be adversely affected" by SIC's participation in high cost funding mechanisms, including the NECA pool).



Hawaiian home lands on all six of the major Hawaiian Islands. With continued RUS loan funds, Sandwich Isles expects to complete the majority of its terrestrial network by the end of 2006. Although Sandwich Isles does not have firm data on the number of potential subscribers, it notes that the Department of Hawaiian Home Lands has a waiting list of approximately 20,000 native Hawaiians who have applied for lots.<sup>55</sup>

This background puts in stark relief NECA's current claims that the Paniolo cable is not in the public interest, is not a prudent investment or used and useful. NECA does not argue that Paniolo's cost of construction was excessive in light of the context (*e.g.*, that it is a submarine cable or that SIC has failed to comply with the FCC's accounting rules). Its only position is that the Paniolo cable is not in the public interest because it was not necessary. However, the Commission has previously found: (a) that the Paniolo cable is in the public interest (and therefore is prudent and used and useful) and *also* (b) that it is in the public interest for SIC's costs associated with the Paniolo cable to be in the NECA pool. Accordingly, the Commission should promptly order NECA to include SIC's costs in the pool.<sup>56</sup>

**B. The Commission Decisions With Regard To SIC Are Consistent With Longstanding Commission Precedent Dealing With The Construction Of New Submarine Cable Capacity**

The SIC study area waiver decisions discussed above are consistent with Commission precedent governing the construction of new submarine cable capacity and Commission policies with respect to investment in broadband. As detailed below, the Commission evaluates the prudent investment based upon the totality of the circumstances. The relevant factors previously identified in Commission submarine cable cases include: the relationship between available capacity and growth in new services and demands for capacity, quality of service, technological

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<sup>55</sup> *FCC 2005 Waiver Decision*, *supra* note 41, at ¶ 19 (emphasis added).

<sup>56</sup> Plainly, the Paniolo cost was adjudicated in the *FCC 2005 Waiver Decision* and is *res judicata* before the Bureau and the Commission. NECA's decision that the Paniolo cable system is not prudent would serve to accomplish for HTI what it has been unable to do on its own, namely to overturn the study area waivers twice granted to SIC.

improvements and competitive considerations. NECA ignored each of these essential factors, rendering its legal analysis fatally flawed. NECA further ignored important Commission policy goals, despite repeated pronouncements by NECA in other proceedings that directly contradict NECA's decision here.

**1. The Factors That The Commission Considers With Regard To New Submarine Cable Capacity**

In general, an investment is considered prudent when it results in the acquisition or construction of an asset that is "used and useful," meaning that it is "property necessary to the efficient conduct of a utility's business, presently or within a reasonable future time."<sup>57</sup> Contrary to NECA's assertions, the "used and useful" standard is not a three-prong test<sup>58</sup> that can be mechanically applied. Rather, the Commission has long recognized that "[t]he particular facts of each case must be ascertained to determine what part of a utility's investment is used and useful."<sup>59</sup> This fact-specific inquiry reflects an effort to balance the telephone company's constitutional interest in "be[ing] compensated for the use of their property in providing service to the public" with the principle that "the ratepayers may not fairly be forced to pay a return

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<sup>57</sup> Final Decision in Docket 19129, Phase II, *In re American Telephone and Telegraph Company The Associated Bell System Companies Charges for Telephone Service*, AT&T Transmittal Nos. 10989, 11027, 11657, 64 F.C.C.2d 1, ¶ 111 (Mar. 1, 1977) ("AT&T Phase II Order") (noting that the Commission has "always applied the used and useful standard in regulating AT&T's interstate rates"); *id.* at ¶ 117 (discussing Supreme Court precedent that draws a connection between "investor capital which is 'prudently invested'" and "plant which is used and useful" (internal citation omitted)). See also Report and Order, *In re Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers*, 2 F.C.C.R. 269, ¶¶ 7-8 (Dec. 24, 1987) (applying the "used and useful" standard to regulation of LECs rates after the divestiture of AT&T). The Commission has also applied the prudent investment and used and useful standards to other rate-regulated services within its jurisdiction, such as cable. See, e.g., Report and Order and Further Notice of Proposed Rulemaking, *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service*, 9 F.C.C.R. 4527, ¶¶ 37-40, n.67 (Mar. 30, 1994) ("Cable Rate Final Order").

<sup>58</sup> NECA Comments, *supra* note 28, at 13, 19.

<sup>59</sup> AT&T Phase II Order, *supra* note 57, at ¶ 115.

except on investment which can be shown directly to benefit them."<sup>60</sup> NECA itself ultimately recognized that "the FCC has generally examined the *totality of the circumstances* and accepted or approved carriers' purchase of goods or services that were *reasonably priced for the facts of each case*,"<sup>61</sup> and concluded that "this is a fair standard."<sup>62</sup>

NECA does not dispute that the Paniolo cable was constructed at a reasonable cost. Rather, NECA argues that the Paniolo cable is not in the public interest because it did not need to be constructed because other submarine cables were available. NECA's conclusion is incorrect because the FCC already concluded that the submarine cable is in the public interest. Even if the FCC had not made this determination, NECA clearly failed to consider the relevant factors that it was obligated to consider as part of the totality of the circumstances.

In its decision approving the construction of the TAT-10 submarine cable, the Commission discussed a number of factors that are relevant to the decision to construct new submarine cable capacity.<sup>63</sup> In that decision, the Commission summarized factors to be considered in making a determination as to whether to authorize a new submarine cable:

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<sup>60</sup> *AT&T Phase II Order*, *supra* note 57, at ¶¶ 111-12.

<sup>61</sup> NECA Comments, *supra* note 28, at 17 (citing Memorandum Opinion and Order, *In re Application of American Telephone and Telegraph Co. For Authority Under Section 214 of the Communications Act of 1934, as Amended, to Supplement Existing Facilities by Construction and Operation of a Lightguide Cable between Cities on a Main Route between Moseley, Virginia and Washington, District of Columbia*, 89 F.C.C.2d 1167 (May 14, 1982), which also states, at ¶ 29, that the Commission was "fully cognizant of [its] Section 1 mandate to provide for communication service with adequate facilities at reasonable charges" but noting that *its "general mandate...calls for consideration of other factors and a balancing of all relevant factors by this Commission in assessing the public interest"* (emphasis added, internal quotes and citations omitted)).

<sup>62</sup> NECA Comments, *supra* note 28, at 17 (emphasis added).

<sup>63</sup> Memorandum Opinion, Order and Authorization, *In re Am. Tel. & Tel. Co. et al. Joint Application for Authorization under Section 214 of the Comm'n Act of 1934, as amended, to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable System between the U.S. and Germany and the Netherlands*, 7 F.C.C.R. 445 (Jan. 13, 1992) ("TAT-10 Decision"). The Commission has since streamlined the cable landing license application process so cases from this  
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In making this determination, we traditionally have considered such factors as demand, cost, media and route diversity, restoration, intramodal and intermodal competition, technological innovations and international comity.<sup>64</sup>

NECA failed to even consider these factors with regard to the Paniolo cable and the other two existing cables. With regard to demand, the Commission noted that the TAT-10 application indicated that the addition of new, more modern submarine cable capacity would lead to increased demand:

The Joint Applicants state that the placing into service of the TAT-9 Cable System is expected to be followed by a rapid growth of demand for reliable, secure and economically priced telecommunications services based upon digital lightwave technology, which has resulted in the total forecasted utilization of the TAT-9 Cable System.... The Joint Applicants note that the reliability of telecommunications services and their usefulness to customers is in part a function of the availability of comparable facilities for diverse routing and service restoration.<sup>65</sup>

The Commission agreed with the proponents that construction of a new cable would lead to an increase in demand:

The Commission has recognized that user demand is determined not only by the need for raw transmission capacity, but also by such user requirements as digital technology, route and media diversity, digital cable restoration capability, security and cost-effectiveness.<sup>66</sup>

In common sense terms, customers are more likely to invest in the invention and launch of new services where those customers are confident that capacity exists.<sup>67</sup> NECA ignored the

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time period should have been reviewed by NECA in order to apprise itself of the appropriate factors to consider.

<sup>64</sup> *TAT-10 Decision*, *supra* note 63, at ¶ 11.

<sup>65</sup> *Id.* at ¶ 9.

<sup>66</sup> *Id.* at ¶ 12.

<sup>67</sup> The Commission's statements in this regard foreshadow the analysis and conclusions of the recent National Broadband Plan, in which the Commission concluded that the construction of new broadband facilities will lead to increased demand for broadband as new services are created, some of which may not exist today.

explosion in broadband services and narrowly focused on existing demand for voice and DSL service.

Moreover, prior Commission decisions show that a simple demand analysis based on available capacity is insufficient. The analysis must also include quality of service. The quality of the available service between islands separated by the Pacific Ocean is a function of route diversity and restoration capability. With regard to route diversity, the Commission has held:

We previously have found that increasing media and route diversity to strengthen service reliability is of decisional significance in our public interest determination to authorize the construction of transoceanic facilities.... As a rule, the more independent routes serving a given location, the greater the ability to restore one that fails. Thus, an increase in route or path diversity is the natural consequence of the introduction of another facility into a region.... We conclude that the introduction of TAT-10 as proposed will enhance route diversity, by adding another independent cable route. Service reliability would be improved since the number of circuits affected by a service interruption on a particular route or routes would be minimized and the ability to re-store service via another digital cable facility would be enhanced.<sup>68</sup>

The Paniolo cable lands in different places than do the other two cables of HTI and Wavecom (formerly PLNI) and thereby provides route diversity. The addition of a third cable creates a redundant path that facilitates service restoration as the Commission further explained:

Restoration pertains to the ability to maintain service in the event of a facility outage. TAT-10 will provide restoration capability for AOR facilities in general, and particularly the digital TAT-8 and TAT-9 cable systems. We find that the introduction of TAT-10 in 1992 as proposed would provide a needed restoration alternative for both TAT-8 and TAT-9.<sup>69</sup>

Thus, the facts underlying the *TAT-10 Decision* were similar to those here in that there were two existing cables. Nevertheless, the Commission concluded that construction of a new cable was appropriate to provide restoration capability.

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<sup>68</sup> *TAT-10 Decision*, *supra* note 63, at ¶¶ 14-15.

<sup>69</sup> *Id.* at ¶¶ 17-18.

Two additional factors considered by the Commission are technological innovations and competitive considerations. With regard to technological innovations, the Commission explained:

In determining the need for additional facilities in a region, the Commission typically considers to what extent the proposed facilities will introduce new technology. In some instances, the effect of introducing new technology in the region is compelling, such as introducing digital fiber optic technology for the first time. In other cases, the technological innovations may not be as significant, such as improvements in laser technology in an area where digital fiber optic technology is already available. In this case, the need for TAT-10 is based on projected demand for digital cable circuits and not solely on technological innovation. Digital fiber optic cable technology is already available in the AOR on the TAT-8 cable system. We note, however, that there have been improvements in the digital technology since TAT-8. For example, TAT-8 employed 1.3 micron laser and 280 Mbit/s technology. TAT-9 improved on this technology by using 1.55 micron laser and 560 Mbit/s technology. The cumulative effect of these improvements is twice the capacity and cheaper per circuit costs.<sup>70</sup>

In this case, the 10 gigabit Paniolo cable placed in service in 2009 represents a significant improvement over the existing 2.5 gigabit cables placed in service in 1994 and 1997, particularly the HTI cable completed in 1994 with dispersion-shifted fiber, rather than the single mode fiber that became industry-standard by 2008. NECA lacked the expertise to assess the technological innovations that occurred between 1994-1997 and 2008 and therefore the NECA decision disserved the needs of Hawaii for the most up-to-date broadband facilities.

Competition considerations are the final factor discussed in the *TAT-10 Decision* and NECA's consideration of this factor was the opposite of what it should have been. The Commission has found that construction of new submarine cables serves the public interest because it lowers prices and creates alternatives that spur customer uptake of the additional capacity:

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<sup>70</sup> *TAT-10 Decision*, *supra* note 63, at ¶ 20.

We previously have recognized that the enhancement of both intermodal and intramodal competition can be expected to spur providers of both inter-national satellite and cable services to keep their services innovative and their prices low.... The opportunity to choose among a range of facilities further allows service providers to be more responsive to customer needs in terms of price, service quality, and service availability.<sup>71</sup>

Thus, the Commission held that competition is a factor that argues *for* construction of new submarine cable capacity because it lowers prices and improves quality of service. That was proven in this case.

NECA orally advised SIC that its denial was based in part upon a cost quote that NECA obtained in 2009 from PLNI for capacity that would replace the Paniolo cable. According to NECA, PLNI's quote demonstrated that SIC's investment was imprudent. NECA ignored data that demonstrates the competitive benefits of the construction of the Paniolo cable. Specifically, NECA disregarded evidence supplied to it by SIC that the 2009 quote from PLNI was five times less than the price quotes obtained by SIC prior to the existence of Paniolo as a competitor.<sup>72</sup> The introduction of new competition and the resulting decline in prices is one of the factors that makes the Paniolo cable used and useful and will lead to increased demand and uptake of the new cable capacity.

More generally, NECA mischaracterizes 34-year old Commission policy statements as advocating a shortsighted approach where new facilities are only authorized as immediately

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<sup>71</sup> *TAT-10 Decision*, *supra* note 63, at ¶ 21.

<sup>72</sup> At the time SIC was making the decision to build the Paniolo cable, SIC received quotes from HTI and PLNI in the amount of \$9-11 million, for the subsea portion. SIC demonstrated that the Paniolo terrestrial facilities comprise 55% of the lease costs. NECA has failed to document the price quote of \$1.2 million received from PLNI after the Paniolo system was already constructed. By that time the market had fundamentally changed with the entrance of a third viable, if not superior, option and thus any quote rendered after construction of the Paniolo facilities is not an accurate reflection of the options available to SIC at the time the investment decision was made.

needed.<sup>73</sup> NECA's allegation that SIC is required to demonstrate that the entire capacity of the Paniolo cable will be used within 2-3 years, either entirely by SIC or partially by SIC and partially sub-leased to other carriers and customers, is inconsistent with the flexible approach taken by the Commission *and NECA* in other cases. The Commission has stated that "the question of what length of time constitutes 'the near future' has no strict, economically sound answer."<sup>74</sup> The Commission has concluded that it is a matter of "Commission judgment and discretion" that once again "depends upon the particular circumstances of each case."<sup>75</sup> The circumstances here are that the Paniolo cable was built at the same time that NECA's members have been laying fiber as quickly as possible in order to provide advanced broadband services. NECA has lauded this development broadly.<sup>76</sup> And, more to the point, NECA has not excluded from the NECA tariff pool the cost of these fiber deployments.

Lastly, it is apparent that NECA's decision was flawed because NECA did not even include the Lease Costs in the NECA tariff calculations for the default two-year period during which the Commission has concluded that it is *prima facie* reasonable for a carrier to include "plant held for future use" in its rate base.<sup>77</sup> NECA itself recognizes that carriers have an opportunity to adjust their costs downward if plant that was expected to be used within the two-

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<sup>73</sup> See NECA Comments, *supra* note 28, at 17-18, 22 (citing Further Statement of Policy Guidelines, *In re Policy to be Followed in Future Licensing of Facilities for Overseas Communications*, 62 F.C.C.2d 451, ¶ 15 (Nov. 29, 1976)).

<sup>74</sup> *AT&T Phase II Order*, *supra* note 57, at ¶ 113.

<sup>75</sup> *Id.* at ¶ 113.

<sup>76</sup> Comments of NECA on NBP Public Notice #19, GN Docket Nos. 09-47, 09-51, 09-137 (Dec. 7, 2009).

<sup>77</sup> See 47 C.F.R. § 32.2002(a) (stating that a carrier must remove the original cost of "plant held for future use" from its rate base – though such assets may remain in the appropriate regulatory account – "[i]f at the end of two years the property is not in service"). Notwithstanding this analysis, as discussed herein, the Paniolo cable is fully in service, with its entire capacity used or available for use as primary transport or reserve capacity for any carrier in Hawaii.



year period has, for some reason, not been placed in service or otherwise fully utilized during that period.<sup>78</sup> NECA's refusal to include the Lease Costs for at least the first two years is clear error demonstrating that NECA's goal here is to force SIC to agree to put lesser costs in the NECA pool or face bankruptcy.

**2. The Commission Has Articulated The Public Interest Mandate That NECA Is Required To Serve**

The "used and useful" standard has clear roots in the Commission's broader public interest considerations. As NECA has recognized, attaining the lowest possible cost to the NECA pool – which is NECA's only apparent purpose in this matter – is not the singular goal of the Commission's rate regulation.<sup>79</sup> Indeed, even where the Commission has preliminarily concluded that "a certain cost [should be] excluded from the ratebase under [the "used and useful" standard], the operator is permitted to present evidence to overcome some or all of the disallowance by showing that these costs benefit subscribers."<sup>80</sup> This clearly reflects the Commission's acknowledgement that evidence of public interest benefits is fundamental to an analysis of prudent investment in used and useful network infrastructure. SIC has submitted ample evidence of substantial benefits of the Paniolo cable to both its own subscribers and Hawaiian consumers generally.

NECA ignored the evidence and leapt to the unfounded conclusion that the public interest is not served by the construction of the Paniolo cable, in effect finding that the State of Hawaii could and should have made do with the existing 2.5 gigabit cables built in 1994 and 1997. To the contrary, the public interest mandate of NECA is clear and the inclusion of the Lease Costs in

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<sup>78</sup> NECA Comments, *supra* note 28, at 15.

<sup>79</sup> *Id.* at 16-17.

<sup>80</sup> *Cable Rate Final Order*, *supra* note 57, at ¶ 37.

the NECA tariff falls squarely within the public interest duties of NECA. The Commission created an association and a tariff pooling process in order to average the costs of serving disparate areas of the United States:

We have decided that we should neither compel all exchange carriers to join in pooled uniform charges for all access elements nor permit unrestricted de-averaging. We are mandating the creation of an exchange carrier association that will collect and distribute the carrier's carrier portion of the non-traffic sensitive charges and file tariffs and administer revenue pools for companies that choose to join in the association's common tariffs for other access elements.<sup>81</sup>

Hawaii and Alaska are high cost areas due to their unique topography, and including service costs in these states increases the average pooled rates. Such an increase in the average rate is consistent with the stated purpose of the Commission to use NECA to average rates across the United States. The Commission noted that failure to implement such cost averaging would subject customers in high cost areas to excessive rates:

The current factors differ widely from one study area to another and many companies that probably will not be classified as high cost companies have interstate NTS costs that are substantially higher than the national average because they happen to have a high interstate SPF. If de-averaged end user rates were implemented under the present circumstances, their customers would be subjected to excessive rate increases.<sup>82</sup>

NECA's denial of SIC's request for inclusion in the pool is inconsistent with the purpose of the pool as a means of rate averaging to assist high cost areas such as Hawaii and Alaska. Earlier this year, NECA asked the Commission to "give consideration to the special needs of carriers seeking to provide broadband services in insular areas such as Hawaii and Alaska."<sup>83</sup> Contrary to NECA's own suggestion that the special needs of Hawaii be met, NECA here

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<sup>81</sup> Third Report and Order, *In re MTS and WATS Market Structure*, 93 F.C.C.2d 241, ¶ 7 (Feb. 28, 1983) ("Access Charge Order").

<sup>82</sup> *Access Charge Order*, *supra* note 81, at ¶ 142.

<sup>83</sup> Comments of NECA, *In re the National Broadband Plan for Our Future*, GN Docket No. 09-51 (Mar. 2, 2010).

appears to have lost sight of the fact that the extraordinary difficulty and cost of serving Hawaii (and Alaska) stems in part from the need to construct submarine cables. Were submarine cable costs to be excluded from the pool as too costly, the concept of rate averaging to assist high cost states would be undermined.

Moreover, NECA exaggerates the cost impact on the NECA pool by focusing on a limited number of existing, narrowband subscribers to be served by SIC. Throughout its initial denial of SIC's funding request,<sup>84</sup> and filings opposing SIC's request for inclusion in the pool, NECA justifies its decision based on its opinion that the Paniolo lease was made "at an extraordinarily high cost relative to the number of subscribers."<sup>85</sup> Not only will the number of HHL subscribers increase, but so will the demand for broadband capacity, and some fibers likely will be sub-leased to other carriers and customers of SIC. NECA's argument rests on a short-sighted snapshot at the launch of a new cable, which unfairly paints Hawaii as unduly burdening other states when in fact the Paniolo cable has the same capacity, *i.e.*, 48 fibers, as fiber optic cables being deployed throughout the U.S. mainland.

Although the Paniolo cable is a major step forward for Hawaii with regard to the FCC's broadband initiative, NECA perceives the Paniolo cable only as an undesirable cost to the nation and refuses to pay for it. NECA's analysis ignores the benefits of the Paniolo cable to the broadband infrastructure of Hawaii, is in contravention of federal policy as embodied in the FCC's National Broadband Plan, and contradicts NECA's very own position on assistance to high cost areas such as Hawaii and Alaska.

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<sup>84</sup> Letter from James Frame, Vice President, NECA, to Alan Pedersen, General Manager, SIC (May 5, 2009).

<sup>85</sup> NECA Comments, *supra* note 28, at 2.

**C. NECA Has No Authority To Overturn The Commission Decisions Finding That The SIC Network Serves The Public Interest**

NECA lacks the authority to refuse to include SIC's costs relating to its lease of the Paniolo cable in the NECA pool. As an administrative agent for its member LECs, NECA is required to accept the cost and revenue data supplied by those carriers and to use that data to compute the NECA tariff, so long as the carriers followed the Commission's cost accounting rules in preparing the data.<sup>86</sup> As discussed below, NECA itself has recognized that decisions to reduce support to an individual LEC based upon that LEC's specific, individual characteristics, amount to adjudication, under the APA and the Commission's rules. And as discussed below, the Commission has expressly held that no adjudicatory or other governmental authority has been delegated to NECA with respect to access charges. NECA has overstepped the bounds of its limited authority, and the Commission should therefore direct NECA to immediately include all of SIC's lease costs in the NECA tariff.

**1. NECA Lacks Authority To Exclude Properly Accounted Costs From The Pool**

From its inception, NECA's authority has been clearly and tightly circumscribed. As initially constituted, NECA's only duties were to "compute the charges and prepare and justify the tariffs on behalf of all participating carriers" and to "compute the distributions that each participant is entitled to receive from the pool."<sup>87</sup> NECA's authority was so limited that it was prohibited from engaging in any "activities that are not directly related to the preparation of access charge tariffs or the distribution of access charge revenues" without express Commission

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<sup>86</sup> See generally 47 C.F.R. Parts 32, 36, 61 and 69.

<sup>87</sup> Access Charge Order, *supra* note 81, at ¶ 339.

authorization.<sup>88</sup> To date, the Commission has not expanded NECA's permitted activities to include the interpretive or adjudicatory functions in which NECA is currently attempting to engage.<sup>89</sup>

The Commission's rules clearly establish NECA as an agent of its member carriers,<sup>90</sup> of which SIC is one.<sup>91</sup> When NECA files its tariffs, it does so on behalf of its member carriers,<sup>92</sup> and those carriers are the parties ultimately responsible for both the tariffs and NECA's actions.<sup>93</sup> The Commission has repeatedly stated that NECA's tariffing duties are predominantly administrative, noting, for example, that "NECA is acting as an agent for its LEC members by completing *the administrative task of filing a tariff* for them."<sup>94</sup> It is wholly inconsistent with

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<sup>88</sup> *Access Charge Order*, *supra* note 81, at ¶ 344.

<sup>89</sup> *See, e.g.*, Memorandum Opinion and Order, *In re National Exchange Carrier Association, Inc.*, 12 F.C.C.R. 3657, ¶¶ 1-7 (Mar. 17, 1997) (summarizing the additional activities that the Commission has authorized NECA to perform since its creation, none of which involve establishment or application of tariffing policy or exclusion of lawful carrier costs).

<sup>90</sup> *See* 47 C.F.R. § 69.3(d) (stating that NECA "shall file a tariff *as agent for* all telephone companies that participate in [a NECA] tariff" (emphasis added)).

<sup>91</sup> *See generally FCC 2005 Waiver Decision*, *supra* note 41.

<sup>92</sup> *See* 47 C.F.R. § 69.601(a) (stating that NECA "shall be established in order to prepare and file access charge tariffs *on behalf of* all telephone companies that do not file separate tariffs or concur in a joint access tariff of another telephone company..." (emphasis added)); *see also* Memorandum Opinion and Order, *In re International Telephone Corp. Petition for Declaratory Ruling on National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5 Governing Universal Service Fund and Lifeline Assistance Charges*, 14 F.C.C.R. 13635, ¶ 17 (Aug. 9, 1999) ("*ICTC Order*") (stating that "[i]n filing these tariffs, NECA is carrying out its duties as agent under section 69.601(a) of the Commission's rules" to prepare and file tariffs on behalf of its member carriers).

<sup>93</sup> *See, e.g.*, *ICTC Order*, *supra* note 92, at ¶ 17 ("The tariff on its face states that the issuing carriers are the LECs themselves, not NECA"); *id.* at ¶ 34 ("[I]t is not NECA, but the LECs, the issuers of the tariff filed on their behalf by NECA, that would actually employ the...provisions contained in NECA's tariff"). *See also* Memorandum Opinion and Order, *In re Communique Telecommunications, Inc. d/b/a Logically and International Telephone Corp. Petition for Reconsideration of the Commission's Order on National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5 Governing Universal Service Fund and Lifeline Assistance Charges*, 16 F.C.C.R. 11453, ¶ 4 (May 21, 2001) ("*ICTC Recon Order*") (stating that aggrieved interexchange carriers "may file a complaint with the Commission against the principals, the member LECs, for any actions taken by NECA").

<sup>94</sup> *ICTC Order*, *supra* note 92, at ¶ 22 (emphasis added).

both NECA's administrative function and its duty as an agent of its member carriers for NECA to reject those carriers' lawful costs from its computation of tariff charges. On the contrary, the Commission has stated that with respect to the NECA tariffs, "the agent's [*i.e.*, NECA's] discretion" is bound "in accordance with the will of the principal [*i.e.*, the member carriers]."<sup>95</sup> In other words, where, as here, a member LEC submits valid and lawful costs, NECA has no discretion to refuse to include them from the NECA tariff.

The Commission's clarification of NECA's operational responsibilities in the NECA Safeguard Order is not contrary to this conclusion.<sup>96</sup> In that Order, the Commission explained that "NECA must use data that complies with our accounting, cost allocation, jurisdictional separations, and access charge rules," and that "NECA must believe in good faith that the data in the filings comply with those rules."<sup>97</sup> In other words, "NECA must implement its rule interpretations" when preparing its tariffs.<sup>98</sup> While this language contemplates a role for NECA in the evaluation of the data submitted to it for inclusion in its tariffs, it is clear that such evaluation must be tethered to applicable Commission rules. Moreover, NECA's authority to act on such evaluations is limited to "correct[ing] any data that it reasonably believes do not comply with our rules."<sup>99</sup>

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<sup>95</sup> *ICTC Recon Order*, *supra* note 93, at ¶ 3.

<sup>96</sup> Report and Order and Order to Show Cause, *In re Safeguards to Improve the Administration of the Interstate Access Tariff and Revenue Distribution Processes*, 10 F.C.C.R. 6243 (Mar. 8, 1995) ("*NECA Safeguard Order*").

<sup>97</sup> *Id.* at ¶ 40. It should be noted that it was NECA's own improper conduct – urging several large LECs to submit costs that did not comply with Commission rules in order to inflate the NECA pool – and not the conduct of individual smaller LECs, that led to the Commission's clarification of NECA's responsibilities in the NECA Safeguard Order. *Id.* at ¶ 3.

<sup>98</sup> *Id.* at ¶ 44.

<sup>99</sup> *Id.* at ¶ 38.

In this case, even after engaging in an extensive review of SIC's cost data,<sup>100</sup> NECA has not identified any Commission rule with which SIC's data allegedly fails to comply.<sup>101</sup> Furthermore, NECA has not suggested that any of SIC's cost data is incorrect. Similarly, NECA has not asserted that it lacks a good faith basis for including that data in the NECA pool and the NECA tariff. Instead, NECA merely notes vague "concerns" about the amount of SIC's investment and the complexity of the contracts related to the Paniolo cable.<sup>102</sup> NECA's observation that the contractual relationship between SIC and Paniolo Cable Co. is "complex" falls far short of a finding that SIC did not properly account for the Lease Costs, and it is therefore clearly insufficient to permit NECA to reject SIC's lawful costs from the NECA tariff.

It is undisputed that the effect of NECA's rejection of Lease Costs would be to substantially reduce the revenue that SIC would receive from the NECA pool. As NECA itself recently noted in comments before the Commission, decisions regarding "the reduction of USF support for an individual RLEC likely constitutes an 'adjudication' within the meaning of both Section 551 of the APA and Part 1 of the Commission's rules."<sup>103</sup> However, the Commission has been clear that "there has been no...delegation" of Commission power to NECA, as evidenced

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<sup>100</sup> See, e.g., Letter from Alan Petersen, General Manager, SIC, to Carol Brennan, Vice President, NECA (May 7, 2008).

<sup>101</sup> NECA asserts that it made a determination that SIC's submission of its lease expenses for inclusion in the NECA pool "was not compliant with FCC rules," but NECA fails to identify any rule with which the submission of those costs does not comply or to provide a basis for its alleged determination of non-compliance. NECA Comments, *supra* note 28, at 12. In particular, NECA has never claimed that SIC's treatment of Paniolo as an unaffiliated entity for cost accounting purposes was in any way improper.

<sup>102</sup> Letter from James Frame, Vice President, NECA, to Alan Pedersen, General Manager, SIC (May 5, 2009).

<sup>103</sup> NECA 2010 High Cost Comments, *supra* note 2, at 23-24, n.59 (internal citations omitted). NECA further suggested that "trial-type evidentiary hearings" might be appropriate with respect to such adjudications, "where an agency 'bases its decision on the peculiar situation of individual parties' or where there are disputes about specific facts, rather than about broader policies and considerations." *Id.* (internal citations omitted).

by the fact that NECA would "not be performing any adjudicatory or other governmental function" and its tariffs would be subject to the same rules and procedures applicable to tariffs filed by individual carriers.<sup>104</sup>

**2. The Commission's Elimination Of The Domestic 214 Certification Did Not Grant NECA Any Authority To Approve Facility Construction**

NECA suggests that the Commission's elimination of the Section 214 application procedure somehow conferred additional authority on NECA to act as the "gatekeeper" to evaluate and approve the extension of new lines.<sup>105</sup> This assertion, which comes out of left field and is wholly unrelated to NECA's tariffing duties, is simply unfounded.

As an initial matter, the fact that the Commission granted carriers "blanket authority to 'construct or operate any domestic transmission line...'" subject only to radio licensing and environmental impact requirements,<sup>106</sup> does not, as NECA suggests, indicate the need for *any* "gatekeeper" to monitor such construction. On the contrary, it reflects precisely the opposite: the Commission's explicit determination that *no* special monitoring or approval is necessary for construction and operation of transmission facilities. As the Commission explained in the order granting carriers blanket domestic 214 authorization:

Rather than maintaining a regulatory regime that may stifle new and innovative services – "input" regulation requiring case-by-case section 214 authorization – we believe it is more consistent with the goals of the 1996 Act to remove this hurdle. Instead, we will rely on the marketplace to ensure reasonable behavior by carriers, including dominant rate-of-return carriers, and on our enforcement

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<sup>104</sup> Memorandum Opinion and Order, *In re MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶ 180 (Aug. 22, 1983) ("Access Charge Recon Order"); see also *Access Charge Order*, *supra* note 81, at ¶ 343 (stating that the Commission did not "believe it would be appropriate to describe [the creation of NECA] as a 'delegation' because the preparation of tariffs and the administration of revenue pools is not a governmental function").

<sup>105</sup> NECA Comments, *supra* note 28, at 7.

<sup>106</sup> *Id.* at 7-8 (citing 47 C.F.R. § 63.01).



authority to remedy the very few problems that may occur in the absence of entry regulation.<sup>107</sup>

Thus, the Commission determined that a combination of market self-regulation and Commission enforcement would be sufficient to ensure reasonable build-out. NECA's efforts to, in effect, regulate carrier conduct by determining what new transmission facilities should be permitted is exactly the type of innovation-stifling hurdle the Commission sought to do away with by granting blanket domestic 214 authority.

Even assuming, *arguendo*, that the Commission's grant of blanket domestic 214 authority envisioned some other entity assuming the mantle of the transmission facility regulator, it is clear that NECA was not intended to be that entity. The 214 Authorization Order says nothing about transferring the Commission's former 214 review functions to NECA.<sup>108</sup> Indeed, the order does not mention NECA at all. NECA has simply invented its purported "gatekeeping" role *vis-à-vis* the construction of new transmission facilities.

However, assuming still further that the 214 Authorization Order somehow conferred on NECA the authority to evaluate the propriety of new transmission facility construction, NECA considered the plans for the Paniolo cable before it was constructed and concluded that it was "reasonable to assume that [SIC would] receive the estimated NECA settlements and High Cost Loop Fund (USF) throughout the projected period."<sup>109</sup> NECA cannot now credibly claim that the appropriate time to act as a "gatekeeper" is *after* over \$150 million was invested to construct the

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<sup>107</sup> Report and Order in CC Docket No. 97-11 and Second Memorandum Opinion and Order in AAD File No. 98-43, *In re Implementation of Section 402(B)(2)(A) of the Telecommunications Act of 1996*, 14 F.C.C.R. 11364, ¶ 13 (Jun. 30, 1999) ("214 Authorization Order").

<sup>108</sup> See generally *id.* As noted above, NECA cannot engage in any new activity without the Commission's express authority. See 47 C.F.R. § 69.603(a).

<sup>109</sup> Letter from Susan Barrett, Director—Pacific Region, NECA, to Judy Ushiro, Manager, Finance and Administration, SIC (Feb. 18, 2000).

facilities, particularly when it had a prior opportunity to evaluate the project and the decision to proceed with the investment was based in large part on NECA's representation that SIC's costs were expected to be recoverable.

3. **Under FCC Rules, NECA Was Required To Prepare Its Tariff Based On SIC's Properly Prepared Cost Data And Any Challenges Were Required To Be Made Through The Tariff Process**

Since the creation of NECA, the Commission has explained "[NECA] tariffs will be reviewed by this Commission under the same panoply of procedural and substantive rules that apply to a tariff filed by an individual carrier."<sup>110</sup> The Commission further asserted that those rules "provide safeguards adequate to protect the interests of not only interexchange carriers but also state commissions and consumers in the fair and evenhanded implementation" of the Commission's access charge plan.<sup>111</sup> Even when the Commission recognized NECA's obligation to ensure that its tariff filings were lawful and correct in the NECA Safeguard Order, the Commission reaffirmed that it "retain[s its] full authority to review NECA's tariff filings in accordance with constitutional and statutory standards."<sup>112</sup> These conclusions reflect the Commission's measured judgment that the appropriate check on NECA's tariffing authority is not NECA's unauthorized vigilantism, but rather the same tariff review process applicable to other carriers.

In light of the foregoing, the proper mechanism for any challenge to the propriety of including the Lease Costs in the NECA tariff is not through NECA's unilateral rejection of those costs, but rather through the tariff suspension or rejection process set forth in the Commission's

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<sup>110</sup> *Access Charge Recon Order*, *supra* note 104, at ¶ 180. Indeed, this Commission oversight was one of the Commission's main justifications for concluding that it had not delegated governmental authority when it mandated the creation of NECA to file tariffs on behalf of exchange carriers.

<sup>111</sup> *Id.* at ¶ 180.

<sup>112</sup> *NECA Safeguard Order*, *supra* note 96, at ¶ 44.

rules.<sup>113</sup> Under those rules, a complainant – typically another carrier – bears the burden of justifying suspension of a tariff.<sup>114</sup> Specifically, the complainant must demonstrate that (1) there is a probability "the tariff would be found unlawful after investigation"; (2) any unreasonable rate would not be corrected in a subsequent filing; (3) irreparable harm will result if the tariff filing is not suspended; and (4) suspension would not otherwise be contrary to the public interest.<sup>115</sup> Unless such a showing can be made, the tariff is *prima facie* lawful and will not be suspended.<sup>116</sup> In this case, NECA should have included SIC's Lease Costs in its tariff and allowed the tariff challenge process, if any, to resolve any questions about the justness or reasonableness of the resulting rates.

**D. The Commission Would Be Acting In An Arbitrary And Capricious Manner If It Were To Allow NECA's Actions To Stand**

**1. NECA's Objectivity Is Called Into Question By Use Of HTI's Counsel**

NECA has profoundly undermined any confidence that SIC or the Commission might have had in NECA's arguments by choosing to be represented by HTI's counsel in this case.<sup>117</sup> Clearly, NECA cannot be receiving unbiased and objective legal advice from its counsel when the same counsel is representing HTI, SIC's primary competitor. NECA has made many of the same arguments that were made by HTI in 2005 when HTI opposed waiver of FCC's rules to allow SIC to build its network. It is interesting that NECA chose to actively participate in this

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<sup>113</sup> See 47 C.F.R. § 1.773.

<sup>114</sup> NECA's exclusion of SIC's lawful costs from its tariff impermissibly shifts this burden from complaining carriers (or their customers) that would allegedly suffer harm from overly high access charges to SIC itself, forcing SIC to prematurely defend the justness and reasonability of its costs before the Commission prior to a tariff including those costs even having been issued by NECA.

<sup>115</sup> 47 C.F.R. § 1.773(a)(iii).

<sup>116</sup> *Id.*

<sup>117</sup> See HTI Comments, *supra* note 35.

proceeding rather than simply letting the affected carriers present their respective positions to the Commission. NECA has chilled and impeded settlement discussions with SIC because counsel to NECA has access to confidential settlement information while counsel simultaneously represents HTI. HTI knows that denial of funding will force SIC and Paniolo into bankruptcy at which point HTI will be able to acquire SIC's network, including the Paniolo cable, at fire sale rates.

## **2. NECA's Actions Are Contrary To State And Federal Policy**

*National Broadband Plan.* The Commission's release of the National Broadband Plan ("NBP") on April 22, 2010, confirms that construction of the Paniolo cable was necessary to provide broadband service to Hawaii at the time the investment was made, and is presently in compliance with the NBP. The NBP makes it clear that the Commission supports investment to extend broadband to all households and all communities at rates of 100/50 Mbps for households and 1 gigabit for communities and community institutions.<sup>118</sup> The NBP also places importance on development in Tribal Lands,<sup>119</sup> which is relevant for SIC as the NBP recognizes HHL areas as Tribal Lands. The Commission notes "while Native Hawaiians are not currently members of federally-recognized Tribes, they are intended to be covered by the recommendations of this Plan, as appropriate."<sup>120</sup> Although NECA contends that the \$15 million per year in submarine cable costs is high relative to other requests in the NECA pool, the fact remains that Hawaii is a uniquely high cost area for intrastate service, with the possible exception of Alaska. Alaska

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<sup>118</sup> FCC, National Broadband Plan, Executive Summary at xiv (2010) ("NBP"), *available at* <http://download.broadband.gov/plan/nationalbroadband-plan-executive-summary.pdf>.

<sup>119</sup> *See, e.g., id.* at 146 (stating that "[a]ny approach to increasing broadband availability and adoption should recognize Tribal sovereignty, autonomy and independence, the importance of consultation with Tribal leaders, the critical role of Tribal anchor institutions, and the community oriented nature of demand aggregation on Tribal lands").

<sup>120</sup> *Id.* at 26, n.71.

supports the inclusion of the Paniolo cable costs in the NECA pool and views the NECA decision against SIC as a dangerous and unwarranted precedent.<sup>121</sup>

***State Level Support.*** As discussed above, SIC was formed at the behest of the State of Hawaii, originally in response to both state legislation seeking to end the monopoly held by GTE<sup>122</sup> and a HPUC decision allowing telecommunications carriers other than GTE to seek authorization to serve rural areas.<sup>123</sup> By focusing on underserved rural areas composed of the HHL, SIC filled a critical gap that was as important to both state and federal policy ten years ago as it is today.<sup>124</sup> As a means of solidifying the reliability and quality of future service, SIC initiated a process of planning for and financing the construction of an inter-island system comprised of both an undersea cable and associated terrestrial facilities. In May 1997, the DHHL designated SIC as an ETC,<sup>125</sup> and the HPUC issued to SIC a Certificate of Authority to provide service to "lands administered by DHHL" later that same year.<sup>126</sup> Thus, to invoke the arbitrary standard employed by NECA throughout its filings, the State of Hawaii and related agencies, who were best situated to determine the situation on the ground so to speak, concluded that construction of the SIC-Paniolo system would indeed be "used and useful".<sup>127</sup> As discussed

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<sup>121</sup> See ATA Comments, *supra* note 27.

<sup>122</sup> In 1994, the Hawaii Legislature enacted Act 80, which directed the HPUC to improve telecommunications service in rural areas by authorizing another telephone company to provide service if necessary. See HRS § 269-16.9(h).

<sup>123</sup> HPUC Doc. No. 94-0346, Order No. 14415 (Dec. 13, 1995).

<sup>124</sup> SIC's study area consists of all 203,500 acres of HHL except a small percentage (mainly in the Honolulu area) that was receiving service from GTE (predecessor to HTI) prior to 1997.

<sup>125</sup> See Letter from Kali Watson, Chairman, Haw. Homes Commission, to Common Carrier Bureau, FCC (May 14, 1997).

<sup>126</sup> *SIC CPCN Order*, *supra* note 7.

<sup>127</sup> The Commission also considers state-level support a relevant factor. For example in its order granting SIC a study area waiver, the Commission expressly referenced the support of the DHHL and the HPUC. See *FCC 2005 Waiver Decision*, *supra* note 41, at ¶ 18.

above, the support and approval of the SIC-Paniolo system also extended to the federal level with the RUS approving funding for major portions of the construction before SIC sought and obtained private financing for the undersea portion of the system.<sup>128</sup>

### **3. NECA Ignored Its Own Policy Of Relying On RUS Funding Approvals As A Proxy For Prudent Investment**

As NECA advised SIC in 2008, NECA utilizes the RUS construction review and loan approval process as a proxy for whether or not proposed network construction is prudent and therefore will be allowed in the NECA pools.<sup>129</sup> NECA's internal policy of relying upon RUS approval should have led NECA to include the Paniolo cable costs in the pool. First, RUS analyzed and approved the construction plan for both the terrestrial and undersea aspects of SIC's network.<sup>130</sup> Second, RUS actually committed to fund both the terrestrial and undersea portions of SIC's network in multiple tranches subject to any RUS budget restrictions that might be in place from time to time:

This is to inform you that the [RUS] will provide the additional funding needed to complete the project proposed in your "C" loan application. The total project cost is \$338,395,400, of which \$97,485,400 was approved in your "C" loan from RUS. The remaining \$240,910,000 will be made available to you through supplemental loans from RUS. The size and number of loans required to completely fund your project will be subject to any budgetary restrictions imposed on RUS.... RUS is happy to participate with [SIC] in undertaking this ambitious project.<sup>131</sup>

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<sup>128</sup> Letter from Ken Chandler, Southwest Area Director, RUS, to Albert Hee, President, SIC (Nov. 30, 2000).

<sup>129</sup> Letter from Carol Brennan, Vice President, NECA, to Alan Pedersen, General Manager, SIC (Apr. 28, 2008).

<sup>130</sup> Letter from Peter Aimable, Southwest Area Engineering Branch, Telecommunications Program, RUS, to Albert Hee, President, SIC (Sept. 20, 2000) ("We have reviewed and approved the [\$338,685,000] loan design submitted in support of your "C" loan application. Our approval is from an engineering standpoint only and is not a commitment that a loan will be made").

<sup>131</sup> Letter from Ken Chandler, Southwest Area Director, RUS, to Albert Hee, President, SIC (Nov. 30, 2000). See RUS Loan Design for SIC, Volume I, Narrative, Section 2.1 (noting that the purpose of the loan design "is to provide new telecommunications infrastructure to connect the service areas of

(Cont'd on following page)

Thus, although the undersea portion of the network (which was not begun until 2007) was ultimately constructed using commercial loans, it does not obviate the fact that the construction plans for both the terrestrial and undersea components of SIC's network were approved by RUS, and therefore according to NECA's normal policy, would have been recognized by NECA as used and useful.

As noted above, SIC has relied upon a combination of RUS and commercial loans to construct the network used to serve the HHL. The terrestrial portion of the SIC's fiber network was funded by RUS (and these costs were included in the NECA pool), while the undersea portion was funded by a commercial loan. To the extent that NECA seized upon the suspension of the RUS C loan as a basis to question the "prudence" of SIC's subsea cable investment, it must be noted that RUS never withdrew its determination that the C Loan was prudent. RUS simply suspended the C loan because HTI appealed the SIC study waiver and thereby placed SIC's USF funding in jeopardy. RUS continues to support the SIC build-out and likely would have reinstated the subsea cable funding at some point, but SIC determined to proceed with a commercial loan in order to avoid further delays caused by HTI's continued litigation against SIC.

## **V. CONCLUSION**

The FCC and NECA should respect the three FCC decisions in 1998, 2004 and 2005 that have determined that SIC's network – including the Paniolo cable – serves the public interest and

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(Cont'd from preceding page)

[SIC] together. The 'C' Loan represents the first phase of a long range plan to connect all HHL areas together with fiber cable including route redundancy. Full implementation of the long range plan is expected to take at least 10 years to complete. The design includes new central office buildings and remote sites, digital central office and remote equipment, both undersea and underground outside plant.... The plant includes 781.5 route miles of terrestrial cable and 352.5 route miles of undersea cable."

deserves to be included in the NECA tariff pool. NECA should comply with the FCC's rules and immediately include all of SIC's Lease Costs and related expenses, including those relating to engineering costs and interest payments, in the NECA pool because the Paniolo cable is a prudent investment that is both used and useful. NECA's attempts to argue otherwise are without legal or factual basis, and in contravention of state and federal public policies.

Respectfully submitted,

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June 3, 2010



**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Sandwich Isles Communications, Inc.	)	
	)	WC Docket No. 09-133
Petition for Declaratory Ruling	)	

**REFERENCE MATERIALS OF  
SANDWICH ISLES COMMUNICATIONS, INC.  
SUPPORTING  
INCLUSION OF ITS UNDERSEA CABLE COSTS  
IN THE NECA POOL**

**June 3, 2010**

## Document Index

Tab	Document
Tab 1	<p><i>In the Matter of Sandwich Isles Communications, Inc.; Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification, 13 FCC Rcd 2407 (Feb. 3, 1998)</i></p> <p>Granting SIC a waiver of the Commission's rules, recognizing that SIC would be making large capital investments to initiate service, and concluding that it is in the public interest for SIC to include its costs in the NECA pool.</p>
Tab 2	<p><i>In the Matter of GTE Hawaiian Telephone Company, Inc.; Application for Review of a Decision by the Common Carrier Bureau; Sandwich Isles Communications, Inc.; Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification, 19 FCC Rcd 22268 (Oct. 29, 2004)</i></p> <p>Recognizing that the HHL are "high-cost" areas, reaffirming SIC's public policy mandate, and ordering SIC to seek a study area waiver to be treated as an incumbent LEC for purposes of receiving universal service support.</p>
Tab 3	<p><i>In the Matter of Sandwich Isles Communications, Inc.; Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary and Sections 36.611, and 69.2(hh) of the Commission's Rules, 20 FCC Rcd 8999 (May 16, 2005)</i></p> <p>Acknowledging the public interest benefits of SIC's infrastructure to be included in the NECA pool, specifically referencing what is now the Paniolo cable, and granting SIC a waiver of the Commission's rules and a study area waiver to permit SIC to continue participating in the NECA pool. This order is issued over Hawaii Telcom's objections that SIC' network, including the Paniolo cable, is too expensive.</p>
Tab 4	This document is withheld pursuant to the Federal Communications Commission Protective Order entered in WC Docket 09-133.
Tab 5	This document is withheld pursuant to the Federal Communications Commission Protective Order entered in WC Docket 09-133.
Tab 6	<p><b>National Exchange Carrier Association, Trends 2009 Report</b></p> <p>Describing the large amount of fiber being installed by rural LECs in the NECA pool on the U.S. mainland, and the fact that in doing so carriers are installing excess capacity in planning for the additional bandwidth needed to satisfy future demand for advanced service such as high-speed broadband.</p>

TAB 1



LEXSEE 13 FCC RCD 2407

In the Matter of Sandwich Isles Communications, Inc.; Petition For Waiver of Section  
36.611 of the Commission's Rules and Request for Clarification

AAD 97-82

**RELEASE-NUMBER:** DA 98-166

FEDERAL COMMUNICATIONS COMMISSION

*13 FCC Rcd 2407; 1998 FCC LEXIS 571*

February 3, 1998 Released; Adopted February 3, 1998

**ACTION:**

[\*\*1] ORDER

**JUDGES:** By the Chief, Accounting and Audits Division

**OPINION BY:** MORAN

**OPINION:**

[\*2407] I. INTRODUCTION

1. On July 8, 1997, Sandwich Isles Communications, Inc. ("Sandwich Isles") filed a petition requesting a waiver of Section 36.611 of the Commission's rules to enable it to receive high cost loop support immediately. n1 Sandwich Isles also seeks clarification or, to the extent necessary, waiver of the definition of "incumbent local exchange carrier" ("incumbent LEC") for the purpose of application of Part 69 rules and for calculation of high cost loop support to ensure that its activities in providing initial service to unserved areas is accorded appropriate regulatory treatment. In this Order, we grant in part and deny in part the petition, as explained below.

n1 Sandwich Isles Communications, Inc., Petition for Waiver, AAD 97-82 (July 8, 1997). On July 14, 1997, the Accounting and Audits Division ("Division") released a public notice soliciting comments on the petition for waiver. *Public Notice, 12 FCC Rcd 6876 (Com. Car. Bur. 1997)*. Comments were filed by the National Exchange Carrier Association ("NECA"). Reply comments were filed by the National Telephone Cooperative Association ("NTCA") and Sandwich Isles. On September 15, 1997, GTE Hawaiian Telephone Company, Inc. ("GTE") filed a Petition to Accept Late-Filed Comments and an Opposition to Sandwich Isles' Petition for Waiver and Request for Clarification and Affidavit in Support of Opposition. On September 24, 1997, Sandwich Isles filed a Notification of Intent to File Reply and on October 2, 1997, Sandwich Isles filed a Reply to GTE's Late-Filed Comments and Opposition.

[\*\*2]

II. BACKGROUND

2. In 1984, the Commission established high cost support mechanisms to promote the nationwide availability of telephone service at reasonable rates. n2 Specifically, high cost loop support allows incumbent LECs with high local loop costs to allocate an additional portion of those costs to the interstate jurisdiction, enabling the state jurisdictions to establish lower local [\*2408] exchange rates in study areas receiving such assistance. n3 Under these rules, a carrier's

high cost loop support is based on the relationship of its historical loop cost to the national average historical loop cost.  
n4

n2 See generally, *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, 96 FCC 2d 781 (1984).

n3 Id.

n4 See 47 C.F.R. § 36.611.

3. In the Universal Service Order released on May 8, 1997, the Commission established new federal universal service support mechanisms consistent with the Communications Act of 1934, as amended. [\*\*3] n5 Under the new federal universal service support mechanisms, support for high cost areas will be based upon forward-looking economic cost mechanisms. Thus, a carrier's support will be based on the forward-looking economic cost of providing the supported services to a service area. Non-rural incumbent LECs will receive support based on forward-looking economic costs beginning January 1, 1999; rural incumbent LECs will begin to receive support based on forward-looking economic costs no earlier than January 1, 2001. n6 Until an incumbent LEC's high cost loop support is based on forward-looking economic costs, its support will continue to be based on historical cost data.

n5 See *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776 at P 308 (May 8, 1997) ("Universal Service Order").

n6 Id.

4. In accordance with Sections 36.611 and 36.612 of the Commission's rules, on July 31 of each year, incumbent LECs submit to NECA loop cost data for the prior year. n7 NECA [\*\*4] compiles and analyzes this data to determine the average cost per loop for each incumbent LEC as well as the nationwide average cost per loop. Each incumbent LEC's high cost loop support amount for the following year is based upon the relationship between its average cost per loop and the nationwide average cost per loop. Because the loop cost data is not submitted by carriers until seven months after the end of a calendar year and because NECA requires time to compile and analyze the data, support is not provided generally to carriers until two years after costs are incurred. n8 This lag can be less than two years if quarterly updates are filed. n9

n7 See 47 C.F.R. §§ 36.611 and 36.612.

n8 For example, on June 30, 1996, incumbent LECs submitted 1995 loop cost data which was used to determine their 1997 high cost loop support. Thus, there is a two-year lag between when costs are incurred (1995) and receipt of high cost support (1997).

n9 See 47 C.F.R. § 36.612.

#### [\*2409] III. PETITION AND COMMENTS

5. Petition. [\*\*5] Sandwich Isles is a new telephone company seeking to provide telephone exchange service to rural customers in a previously unserved area. n10 Sandwich Isles states that it will provide service to approximately 4,700 customers over the next five years. On May 9, 1995, Sandwich Isles received a license from the Department of Hawaiian Home Lands ("DHHL") n11 for the construction and operation of a telecommunications network on Hawaiian Home Lands ("HHL") throughout Hawaii. On November 14, 1997, the Hawaii Public Utilities Commission ("Hawaii Commission") authorized Sandwich Isles to provide interLATA and intrastate telecommunications services within and between the HHL throughout Hawaii. n12 Sandwich Isles states that over the next 10 to 15 years it will initiate service to unserved portions of HHL on the Islands of Oahu, Hawaii, Maui, Kahoolawe, Lanai, Molokai, and Kauai. n13 Sandwich Isles states that it initiated local exchange service on December 2, 1997, through the services of a wireless carrier.  
n14

n10 Petition at 2.

n11 The DHHL is a State agency created by a Federal statute in 1921 and was made part of Hawaii's State Constitution when Hawaii was granted Statehood in 1959. The Hawaii Homes Commission Act set aside approximately 200,000 acres of the ceded public lands for homesteading by native Hawaiians and granted the DHHL jurisdiction over these lands. The DHHL has exclusive statutory control of and responsibility for the management of lands in the State of Hawaii designated as Hawaiian Home Lands. Petition at 4.

[\*\*6]

n12 See Hawaii Public Utilities Commission, Order No. 16078, Docket No. 96-0026, dated November 14, 1997.

n13 Petition at 5.

n14 Letter from Sylvia Lesse, Kraskin & Lesse, to Magalie Roman Salas, Secretary, FCC, dated January 6, 1998.

6. Sandwich Isles seeks a waiver of Section 36.611 to permit it to receive high cost loop support based on current costs, and to direct NECA to begin making high cost loop support payments to Sandwich Isles immediately. n15 Sandwich Isles proposes to submit to NECA a rolling annualized average of current costs, which would be subject to true-up adjustments quarterly based on actual costs. n16 Sandwich Isles states that this methodology previously has been met with Commission approval. n17 Sandwich Isles states that, although initial high cost loop support payments would be based on projections, the projections would be updated quarterly with actual cost data. Thus, reliance on projected cost data would be diminished, and ultimately high cost [\*2410] loop support payments for the initial year of operation would be based solely on actual cost. n18

n15 Petition at 2-3.

[\*\*7]

n16 Id. at 11.

n17 Id. See *Border to Border Communications, Inc., Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules, Memorandum Opinion and Order, 10 FCC Rcd 5055 (1995)* ("Border to Border").

n18 Petition at 11.

7. Sandwich Isles argues that application of the Commission's rules in this instance would be contrary to the public interest because it would deny high cost loop support to a new company proposing to provide initial service to a rural area. n19 Sandwich Isles states that failure to grant a waiver would result in substantial increases in local rates. n20 Sandwich Isles also asserts that increased local rates would discourage subscription to local telephone service and jeopardize the future availability of service, a result antithetic to the goals of universal service policies. Thus, Sandwich Isles contends that the primary principle underlying Section 36.611 -- the promotion of nationwide availability of telephone service at reasonable rates by assisting incumbent LECs operating in high cost areas -- would be frustrated without [\*\*8] the grant of the requested waiver. n21

n19 Id. at 8.

n20 Id. at 9.

n21 Id. at 8.

8. To enable the provision of service, Sandwich Isles also seeks clarification or, to the extent necessary, waiver of the definition of "incumbent LEC" to ensure that the treatment of Sandwich Isles is consistent with that of other simi-

larly situated carriers. In addition, Sandwich Isles states the Commission should clarify and confirm that Sandwich Isles is eligible to participate in NECA under Part 69 rules. n22

n22 Id. at 12.

9. Comments. NECA and NTCA support Sandwich Isles' Petition. NECA states that the methodology proposed by Sandwich Isles is administratively feasible and can be incorporated in NECA's current high cost loop support reporting mechanisms. n23 NTCA states that grant of this waiver is clearly in the public interest and consistent with the underlying [\*\*9] goal of universal service. n24

n23 NECA comments at 3.

n24 NTCA comments at 2.

#### IV. DISCUSSION

10. Waiver of Commission rules is appropriate only if special circumstances warrant deviation from the general rule and such a deviation will serve the public interest. n25 Further, the [\*2411] waiver generally must be consistent with the principles underlying the rule for which a waiver is requested. n26 In previous proceedings, the Division granted waivers of Section 36.611 permitting Border to Border Communications, Inc. ("Border to Border") and South Park Telephone Company ("South Park") to receive high cost loop support without delay, using projected costs rather than the required historical costs. We permitted immediate access to high cost support because the carriers were offering to serve previously unserved areas which would have likely remained without service if these carriers were unable to provide service. n27 In these proceedings, we found compelling reasons to permit immediate high cost loop support for [\*\*10] new carriers providing service to unserved areas. In these proceedings, we also concluded that denying immediate high cost loop support could have the unintended effect of discouraging service in unserved, remote areas, thereby frustrating the Commission's goal of promoting universal service at reasonable rates.

n25 *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); 47 C.F.R. § 1.3.

n26 *City of Angels Broadcasting Inc. v. FCC*, 745 F.2d 656, 662-63 (D.C. Cir. 1984).

n27 See *Border to Border*, *supra* note 17. See also *South Park Telephone Company, Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, Order, DA 97-2730 (December 31, 1997).

11. Sandwich Isles' circumstances are sufficiently similar to warrant the same treatment as Border to Border and South Park. Because Sandwich Isles will provide [\*\*11] service to previously unserved areas, we find that the special circumstances warranting the grant of a waiver of the Commission's rules are present and that it is in the public interest to grant Sandwich Isles' request for a waiver of Section 36.611 of the Commission's rules. Therefore, we grant Sandwich Isles a waiver of Section 36.611 of the Commission's rules to the extent necessary to permit it to receive high cost loop support for the period January 1, 1998 through December 31, 1999 based initially on projected costs followed by quarterly true-ups using actual costs. Payments beginning in the year 2000 will be based on the historic data on which high cost loop support traditionally is calculated and in accordance with the rules adopted in the Universal Service Order. Support payments, however, are contingent on Sandwich Isles satisfying the eligibility requirements specified in Section 214(e) of the Act. n28 Finally, because this Order provides the final regulatory approval necessary for Sandwich Isles to initiate service, we make it effective upon release.

n28 See 47 U.S.C. § 214(e).

[\*\*12]

12. Sandwich Isles initiated service on December 2, 1997. Sandwich Isles proposes to receive support for the period December 2, 1997 to December 31, 1997 based on annualized projected costs. High cost loop support payments are

traditionally calculated based on 12-month calendar year historic operating results. Calculating initial high cost loop support based on an annualization of operating data from December 2, 1997 to December 31, 1997 does not provide an adequate basis upon which to compute high cost loop support because of the potential volatility of annualizing based on 30 days of operations and because of the potentially higher operating costs in the initial 30-day period due to higher costs associated with initiating service. We, thus, deny Sandwich Isles' request for a waiver to allow it to receive high cost loop support for the period December 2, 1997 to December 31, 1997.

[\*2412] 13. We also find it reasonable that Sandwich Isles participate in NECA pools and tariffs. Participation in NECA will allow Sandwich Isles to avoid the costs of filing and maintaining its own company-specific interstate tariffs. The cost of preparing company-specific tariffs could be excessive [\*\*13] for a company with relatively few customers. In addition, because Sandwich Isles plans to make large capital investments to initiate service, its company-specific rates would likely be extremely high. n29 Therefore, it is in the public interest to permit Sandwich Isles and its potential customers to benefit from both the cost savings and lower rates available through NECA participation. Having reached this conclusion, we now address the specific waivers necessary to allow it to participate in the NECA tariffs and pools.

n29 Petition at 7.

14. To be a member of NECA and to participate in its tariffs, it must be a "telephone company," as defined in Part 69 of the Commission's rules. n30 Part 69 defines a "telephone company" as an incumbent LEC as defined in Section 251(h) of the Act. n31 Furthermore, Section 36.611 of the Commission's rules, which governs the submission of data to NECA for purposes of calculating high cost loop support, only applies to incumbent LECs. n32 Section 251(h)(1) of the Communications Act states [\*\*14] that an "incumbent LEC" is a provider of telephone exchange service and a member of NECA on the date of enactment of the 1996 Act. n33 The section also provides that a successor or assign of an incumbent LEC is also an incumbent LEC. Sandwich Isles is a new carrier initiating service to an unserved area. It is not a member of NECA, and it is neither a successor nor assign of an incumbent LEC. Sandwich Isles, therefore, does not meet the statutory definition of incumbent LEC.

n30 See 47 C.F.R. § 69.601.

n31 47 C.F.R. § 69.2(hh).

n32 See 47 C.F.R. § 36.611.

n33 See 47 U.S.C. § 251(h)(1).

15. When the Commission revised Sections 36.611 and 69.2 to require that telephone companies be incumbent LECs to participate in NECA tariffs and pools and to file data pursuant to Section 36.611, the Commission did not specifically provide for companies that come into existence after the enactment of the 1996 Act and that serve previously unserved areas. The purpose of the incumbent LEC [\*\*15] restriction in Section 36.611 is to distinguish competitive LECs from incumbent LECs for purposes of calculating universal service support, not to impose interconnection requirements. Sandwich Isles will be the sole provider of service to the area; thus, it is not a competitive LEC. As a rural telephone company, n34 Sandwich Isles is exempt [\*2413] from the interconnection requirements in Section 251(c) until the company receives a bona fide request for interconnection, services, or network elements, and the Hawaii Commission determines that such request is not unduly economically burdensome, is technically feasible, and is consistent with Section 254 of the Act. n35 Accordingly, we find that the purposes underlying the incumbent LEC requirements in Parts 36 and 69 of the Commission's rules are not applicable to Sandwich Isles' request to receive high cost loop support and to participate in NECA. We therefore waive the incumbent LEC requirements of Part 36 and Part 69 of the Commission's rules for Sandwich Isles. This waiver permits Sandwich Isles to become a member of NECA and to participate in NECA pools and tariffs, but does not affect Sandwich Isles' obligations under Section [\*\*16] 251. Furthermore, for regulatory purposes we will recognize Sandwich Isles' service territory in Hawaii as a study area. n36

n34 See 47 U.S.C. § 153(37). Under this section "the term 'rural telephone company' means a local exchange carrier operating entity to the extent that such entity -- . . . provides telephone exchange service, including exchange access, to fewer than 50,000 access lines . . . ." Sandwich Isles will satisfy this criterion and, therefore, it is a rural telephone company.



n35 See 47 U.S.C. § 251.

n36 See Request for Clarification filed by the *National Exchange Carrier Association, Inc.*, *Memorandum Opinion and Order*, 11 FCC Rcd 8646 at P 9 (1996) (establishing that a study area waiver is not required where a separately incorporated company is establishing a study area for previously unserved territory).

16. We also address in this Order a petition submitted by GTE 32 days after the filing deadline. [\*\*17] In its Petition to Accept Late-Filed Comments, GTE asserts that its late filing is attributable to disruption resulting from the promotion of critical senior GTE personnel at a time when, in addition to this proceeding, GTE was involved in other substantial litigation and regulatory proceedings before the Commission, the Hawaii Commission, and the Hawaii Supreme Court. GTE states that the Commission has found good cause for acceptance and consideration of late-filed comments where the party filing the late comments "was involved in substantial litigation" (citing *In re Complaint of Syracuse Peace Council*, 2 FCC Rcd 5043, 5060 n. 53 (1987)). In the Syracuse Peace Council case, the Commission did accept the American Civil Liberties Union's ("ACLU") Motion for Leave to File Comments Out-of-Time because it was involved in other substantial litigation. ACLU, however, filed its comments only seven days late. Generally, it is not Commission policy to accept late-filed comments. n37 Therefore, the Petition to Accept Late-Filed Comments filed by GTE Hawaiian Telephone Company, Inc. on September 15, 1997, is denied.

n37 See *AT&T Communications, Revisions to Tariff FCC No. 12*, 6 FCC Rcd 5261, Commission denied comments that were filed 32 days late; *AT&T Communications, Revisions to Tariff FCC No. 12*, 6 FCC Rcd 5272, Commission denied comments that were filed 49 days late; *AT&T Communications, Revisions to Tariff FCC No. 12*, 6 FCC Rcd 6654, Commission denied comments that were filed 14 days late.

[\*\*18]

#### V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 5(c), 201, 202, 218-220, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 202, 218-220, 254, and Sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the Petition of Sandwich Isles Communications, Inc. for waiver of [\*2414] Section 36.611 and 69.601 of the Commission's rules, 47 C.F.R. §§ 36.611, 69.601, IS GRANTED to the extent discussed in this Order and otherwise IS DENIED.

18. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 5(c), 201, 202, 218-220, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 202, 218-220, 254, and Sections 0.91, 0.291 and 1.727 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and 1.727 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and 1.727 that the "Petition to Accept Late-Filed Comments" filed by GTE Hawaiian Telephone Company, Inc. on September 15, 1997, IS DENIED.

Kenneth P. Moran

Chief, Accounting and Audits Division

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Communications LawFederal ActsCommunications ActTariffsCommunications LawTelephone ServicesLocal Exchange CarriersTariffs

TAB 2

LEXSEE

In the Matter of GTE Hawaiian Telephone Company, Inc.; Application for Review of a Decision by the Common Carrier Bureau; Sandwich Isles Communications, Inc.; Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification

AAD 97-82

RELEASE-NUMBER: FCC 04-256

FEDERAL COMMUNICATIONS COMMISSION

19 FCC Rcd 22268; 2004 FCC LEXIS 6215

October 29, 2004, Released; October 25, 2004, Adopted

**CORE TERMS:** unserved, high-cost, universal, incumbent, ex parte, carrier, loop, territory, reply, clarification, serving, telephone service, tariff, Commission's Rules, providing service, new study, designated, Communications Act, late-filed, designation, adjacent, service area, deadlines, delegated authority, procedural error, provide service, facts presented, prejudicial, clarified, designate

**ACTION:**

[\*\*1] MEMORANDUM OPINION AND ORDER

**JUDGES:** By the Commission: Commissioner Copps concurring and issuing a statement.

**OPINION:**

[\*22268]

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order, we grant Verizon Hawaii, Inc.'s (Verizon Hawaii) (formerly GTE Hawaiian Telephone Company) (GTE) Application for Review of a decision by the Accounting and Audits Division of the Common Carrier Bureau (Bureau) made on delegated authority, granting Sandwich Isles Communications, Inc. (Sandwich Isles) a waiver to be treated as an incumbent local exchange carrier (LEC) serving a previously unserved area for purposes of receiving high-cost universal service support. n1 As explained below, we conclude that the Bureau erred by ignoring evidence in the record that the areas Sandwich Isles proposed to serve were not unserved. Consistent with Commission precedent, we require Sandwich Isles to seek and obtain a study area waiver in order to be treated as an incumbent LEC for purposes of receiving universal service support.

n1 *Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification*, Order, AAD 97-82, 13 FCC Rcd 2407 (Acct. Aud. Div. 1998) (*Sandwich Isles*); Application for Review of an Order Granting in Part a Petition for Waiver by Sandwich Isles Communications, Inc., by GTE Hawaiian Telephone Company Incorporated, filed March 5, 1998 (Application for Review). Verizon Hawaii is the successor to GTE. In this Memorandum Opinion and Order, we refer to Verizon Hawaii to identify the legal entity whose claims we address. We refer to GTE to identify the historical entity that was providing telephone service in Hawaii when the Application for Review was filed. The Accounting and Audits Division subsequently became the Accounting Policy Division. The Accounting Policy Division and the Common Carrier Bureau subsequently became the Telecommunications Access Policy Division and the Wireline Competition Bureau, respectively, pursuant to the Commission's reorganization in March 2002.

[\*\*2] **II. BACKGROUND**

2. *Sandwich Isles Petition*. On July 8, 1997, Sandwich Isles filed a petition requesting a waiver of section 36.611 of the Commission's rules to permit it to receive high-cost loop support based [\*22269] on projected costs until historical costs became available. n2 Sandwich Isles said that it was a new LEC that would be providing service to previously unserved portions of the Hawaiian Home Lands. Sandwich Isles also sought clarification or, to the extent necessary, waiver of the definition of incumbent LEC for purposes of calculating universal service support and Part 69 of the Commission's rules. Sandwich Isles claimed it was not required to seek a study area waiver because it was establishing a study area serving previously unserved areas. n3

n2 Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules and request for Clarification, AAD 97-82, filed July 8, 1997 (Petition).

n3 See Petition at n.3.

3. *Opposition and Reply*. After the comment period had closed, Verizon Hawaii filed an Opposition to Sandwich Isles' Petition arguing that the areas Sandwich Isles proposed to serve were not, in fact, "currently [\*\*3] unserved," because they were within the serving territory of Verizon Hawaii's central offices. n4 Although some areas currently had no telephone service, these were new subdivisions adjacent to areas served by GTE. n5 Verizon Hawaii further stated that it is obligated to provide service throughout the state. n6 In reply, Sandwich Isles argued that there was no overlap in the Hawaiian Home Lands service areas described in its Petition and areas served by GTE. n7 Sandwich Isles argued that GTE could not provide service to the Hawaiian Home Lands described in its Petition because Sandwich Isles "is exclusively licensed to serve" those areas. n8

n4 Opposition of GTE Hawaiian Telephone Company Incorporated to Sandwich Isles Communications, Inc.'s Petition for Waiver and Request for Clarification and Affidavit in Support of Opposition, filed Sept. 15, 1997 at 2 (Opposition to Petition). See also Petition to Accept Late-filed Comments and Opposition, by GTE Hawaiian Telephone Company Incorporated, filed Sept. 15, 1997.

n5 See *id.*

n6 See *id.* at 8-9. ("Under its charter, GTE Hawaiian Tel has an obligation to continue to provide service throughout the State to any resident who requests service unless the commission designates another carrier as the carrier of last resort") (citation omitted). See also *id.*, Affidavit of Susan Eichor at 1.

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n7 Reply to Late-Filed Comments and Opposition, by Sandwich Isles Communications, Inc., filed Oct. 2, 1997, at 5 (Reply).

n8 Reply at 6.

4. *Bureau Order under Review*. On February 3, 1998, the Bureau granted in large part Sandwich Isles' Petition. Specifically, the Bureau granted Sandwich Isles a waiver of section 36.611 of the Commission's rules to the extent necessary to permit it to receive high-cost loop support for the period January 1, 1998 through December 31, 1999 based initially on projected costs followed by quarterly true-ups using actual costs. n9 In addition, the Bureau waived the incumbent LEC requirements of Part 36 and 69 of the Commission's rules to permit Sandwich Isles to receive high-cost loop support based on its costs and to become a member of the National Exchange Carriers Association (NECA). n10 In addition, the Bureau said that "for regulatory purposes we will recognize Sandwich Isles' service territory in Hawaii as a study area." n11 Finally, the Bureau denied Verizon Hawaii's Petition to Accept Late-Filed Comments and did not consider the claims made in its Opposition. n12

n9 *Sandwich Isles*, 13 FCC Rcd at 2411. The Bureau denied Sandwich Isles request for a waiver to allow it to receive high-cost loop support for the period December 2, 1997 to December 31, 1997. *Id.*

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n10 *Id.* at 2413.

n11 *Id.*

n12 *Id.*

5. *Application for Review.* On March 5, 1998, Verizon Hawaii filed an Application for [\*22270] Review of *Sandwich Isles*, making essentially the same arguments it made in its Opposition to the Sandwich Isles Petition. n13 On March 27, 1998, Sandwich Isles filed an Opposition to the Application for Review, making essentially the same arguments it made in its Reply to the Opposition to its Petition. n14 Both parties submitted additional information, but this information did not fundamentally change the pertinent underlying facts. n15

n13 Application for Review.

n14 Opposition to Application for Review, by Sandwich Isles Communications, Inc., filed March 27, 1998 (Opposition to Application for Review).

n15 For example, both parties filed maps identifying the areas Sandwich Isles proposed to serve. *See* Letter from W. Scott Randolph, GTE, to Magalie Roman Salas, FCC, dated April 2, 1998; Supplement and Motion for Leave to File Supplement, by Sandwich Isles, filed June 1, 1998.

### III. DISCUSSION

6. Section 1.115 of the Commission's rules specify the factors that warrant Commission consideration [\*\*6] of the issues presented in an application for review of action taken pursuant to delegated authority. n16 The Commission considers, among other things, whether the action taken is in conflict with case precedent or established Commission policy; n17 whether it was based upon an erroneous finding as to an important or material question of fact; n18 or whether there was prejudicial procedural error. n19

n16 47 C.F.R. § 1.115(b). Section 1.115(b)(2) provides that the application for review shall specify from among the factors listed, which factors warrant Commission consideration of the questions presented. *Id.* Verizon Hawaii claims that the Bureau's decision is premised upon an erroneous factual finding and is contrary to Commission precedent, and that the Bureau's refusal to consider Verizon Hawaii's proffered Opposition to Sandwich Isles' Petition resulted in prejudicial procedural error. *See* Application for Review at 2-4.

n17 47 C.F.R. § 1.115 (b)(2)(i).

n18 47 C.F.R. § 1.115 (b)(2)(ii).

n19 47 C.F.R. § 1.115 (b)(2)(v).

7. We conclude that the Bureau erred by failing to consider the facts presented by Verizon Hawaii in its late-filed Opposition to Sandwich [\*\*7] Isles' Petition. Although the Commission does not routinely grant extensions of time, n20 we agree with Verizon Hawaii that the Bureau should have considered the facts presented in this case. n21 In granting Sandwich Isles' request for waiver of 36.611 of the Commission's rules, the Bureau relied on *Border to Border* and *South Park*, explaining that in those cases it had "permitted immediate access to high cost support because the carriers were offering to serve previously unserved areas [that] would have likely remained without service if these carriers were unable [\*22271] to provide service." n22 The Bureau did not question Sandwich Isles' claim that it would be providing service to previously unserved rural areas. Verizon Hawaii raised important facts with regard to Sandwich Isles' claim that the areas it proposed to serve were previously unserved. n23 In particular, Verizon Hawaii states that the proposed areas were served by GTE central offices. n24 These facts were material to the Bureau's decision to grant Sandwich Isles' request for waiver and to treat it as an incumbent LEC for purposes of receiving universal service support. n25

n20 47 C.F.R. § 1.46(a). The case cited by the Bureau for the proposition that, "generally, it is not Commission policy to accept late-filed comments," are all tariff cases. *Sandwich Isles*, 13 FCC Rcd at 2413, para. 16. Tariff proceedings have statutory deadlines and the filing deadlines for petitions seeking investigation, suspension, or rejection of a new or revised tariff are governed by section 1.773(a)(2) of the Commission's rules, rather than section 1.46(a). *See* 47 U.S.C. § 204; 47 C.F.R. § 1.773(a)(2).

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n21 In this case, Verizon Hawaii's motion requested in the alternative that the Commission treat its late-filled Opposition as an ex parte filing, which the Bureau declined to do. However, the record in the proceeding was not closed, as three months thereafter the Bureau received from Sandwich Isles additional information that the Bureau itself had requested. See Letter from Sylvia Lesse and Margaret Nyland, Counsel for Sandwich Isles, to Magalie Roman Salas, dated Dec. 24, 1997. Therefore, because the Bureau in fact had ample time to consider the information contained in the Opposition, as well as Sandwich Isles' reply thereto, under these facts the Bureau should have treated that opposition as an ex parte filing. Finally, we note that Verizon Hawaii's failure to serve the National Exchange Carrier Association does not bar consideration of the Opposition as an ex parte filing because Verizon Hawaii did serve Sandwich Isles and, thus, had standing to file the ex parte.

n22 *Sandwich Isles*, 13 FCC Rcd at 2411, para. 10. See *Border to Border Communications, Inc., Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, Memorandum Opinion and Order, AAD 94-61, 10 FCC Rcd 5055 (Com. Car. Bur. 1995) (*Border to Border*); *South Park Telephone Company, Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, Order, AAD 97-41, 13 FCC Rcd 198 (Acct. Aud. Div. 1997) (*South Park*).

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n23 Verizon Hawaii also claims that the Bureau's decision is contrary to Bureau precedent in *TelHawaii*. See Application for Review at 4-7; Opposition at 3-6; *Petition for Waivers Filed by TelAlaska, Inc. and TelHawaii, Inc. Concerning Sections 36.611, 36.612, 61.41(c)(2) and the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, AAD 96-93, 12 FCC Rcd 10309, 10316, para. 17 (Acct. Aud. Div. 1997) (*TelHawaii*). We do not address this argument, because there now is clear Commission precedent on the issue. See *infra* para. 8.

n24 Verizon Hawaii indicates that some proposed areas were "located in the center of the city of Honolulu and - far from being "unserved" - are served by some of the largest central offices in the state of Hawaii." See Application for Review at 9; see also Opposition to Petition at 7. Although Verizon Hawaii acknowledges that some proposed areas did not have telephone service, it states that these were planned Hawaiian Home Lands subdivisions that had not yet been built and were adjacent to subdivisions served by GTE. See Application for Review at 7 ("GTE Hawaiian Tel is presently providing service to subdivisions directly and immediately adjacent to those identified by [Sandwich Isles], and has every intention of providing service to the new subdivisions as well.").

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n25 Sandwich Isles concedes that the areas it proposed to serve were "in the vicinity of existing GTE facilities," but argues that the proposed areas met the definition of "unserved" because there was no telephone service at the time of its Petition. Sandwich Isles Reply at 5.

8. Consistent with the Commission's recent *Skyline* decision, we require Sandwich Isles to seek and obtain a study area waiver in order to be treated as an incumbent LEC for purposes of receiving universal service support. n26 In *Skyline*, the Commission found that the exchanges served by Skyline Telephone Company (Skyline) were within the Qwest and Verizon study areas and that a study area waiver was required in order for Skyline Telephone to receive support for a newly formed study area. n27 Skyline had sought waiver of the Commission's rules to enable it to receive accelerated high-cost loop support and to participate in NECA pools and tariffs. n28 Skyline asserted that it was not required to seek a study area waiver because its exchanges constituted a previously unserved area. n29 The Commission explained that it had never enunciated an exception to its study area waiver requirements for unserved [\*\*11] areas, nor had the term "unserved" been defined for purposes of the study area waiver requirements [\*22272] specifically, or Part 36 of the Commission's rules, more generally. n30 The Commission concluded that treating an area as unserved when it was previously within an existing study area would be inconsistent with the purpose of the study area freeze and would require a study area waiver. n31 The Commission's primary objective in freezing study area boundaries was to prohibit

companies from setting up high-cost exchanges within existing service territories as separate study areas to maximize high-cost support. The creation of a new study area has the effect of placing a new burden on the federal universal service fund. n32 Accordingly, the Commission clarified that a study area waiver request must be filed with the Commission where a company is seeking to create a new study area from within one or more existing study areas. n33

n26 See *M&L Enterprises, Inc., d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612, and 69.2(hh) of the Commission's Rules*. CC Docket No. 96-45, Order, FCC 04-86 (rel. April 12, 2004) (*Skyline*)

n27 *Skyline*, FCC 04-86, at paras. 11-13.

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n28 The Commission dismissed as moot *Skyline's* request for waiver of sections 36.611 and 36.612 of the Commission's rules. See *Skyline*, FCC 04-86, at paras. 22-23.

n29 *Skyline* relied on a 1996 Bureau order that held that carriers are not required to seek study area waivers if a separately incorporated company is establishing a study area for a previously unserved area. See *Skyline*, FCC 04-86, at para. 10 & n.33; *Request for Clarification filed by the National Exchange Carrier Association, Inc., and Petitions for Waiver Filed by Alaska Telephone Company, Ducor Telephone Company, and Kingsgate Telephone, Inc., Concerning the Definition of "Study Area" in the Part 36 Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, AAD 95-175, AAD 96-29, AAD-96-51, 11 FCC Rcd 8156, 8160, at para. 9 (Com. Car. Bur. 1996) (*Study Area Waiver Exceptions Order*).

n30 *Skyline*, FCC 04-86, at para. 11.

n31 See *MTS and WATS Market Structure; Establishment of a Joint Board; Amendment*, Decision and Order, CC Docket Nos. 78-72, 80-286, FCC 84-637, 50 Fed. Reg. 939 (1985) (*1985 Order Adopting Joint Board Recommendation*); *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, Recommended Decision and Order, CC Docket Nos. 78-72, 80-286, 49 Fed. Reg. 48325 (1984) (*1984 Joint Board Recommended Decision*). See also 47 C.F.R. § 36 App.

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n32 *Skyline*, FCC 04-86, at para. 11.

n33 *Id.* at para. 13. Any such waiver request will be evaluated under the criteria set forth in the *PTI/Eagle Order*. This will ensure that the Commission has an opportunity to determine whether the creation of a new study area will have an adverse impact on the federal universal service fund, consistent with section 254 of the Act. The Commission also clarified that a study area waiver request is not required when a company is combining previously unserved territory with one of its existing study areas in the same state, or when a holding company is consolidating existing study areas in the same state. See *Study Area Waiver Exceptions Order*, 11 FCC Rcd at 8160, para. 9.

9. We find that the exchanges now served by Sandwich Isles were within the GTE study area (and are now within the Verizon Hawaii study area). The Hawaii Commission designated GTE as an eligible telecommunications carrier (ETC) for the State of Hawaii, effective Jan. 1, 1998. n34 Although Hawaii has the authority to designate ETCs within the state, n35 the designation of Sandwich Isles as eligible for support for serving the Hawaiian [\*\*14] Home Lands resulted in the creation of a "high-cost" area that was previously within the study area of GTE in the State of Hawaii. The creation of a new study area has the effect of placing a new burden on the federal universal service fund. By requiring Sandwich Isles to seek a study area waiver, the Commission will have the opportunity to consider whether creating a high-cost study area in Hawaii would have an adverse effect on the universal service fund and whether or not it would serve the public interest. n36



n34 See GTE Dec. 9 *ex parte* at 3 & n.3. As an ETC, GTE was required to provide supported services throughout its designated service areas under section 214(e)(1) of the Act. See 47 U.S.C. § 214(e)(1). As an incumbent LEC, the designated service area for GTE was its study area. See *id.*; see also *supra* note 6.

n35 See 47 U.S.C. § 214(e)(2). At the time Sandwich Isles filed its Petition, Sandwich Isles had not been designated as an ETC by the Hawaii Public Utilities Commission (Hawaii Commission). Sandwich Isles claims that it did not need ETC designation by the Hawaii Commission, because the Department of Hawaiian Home Lands (DHHL) "exercises exclusive and independent jurisdiction over these trust lands." See Letter from Sylvia Lesse, Counsel for Sandwich Isles, to Magalie Roman Salas, FCC, dated Nov. 12, 1998 (Sandwich Isles Nov. 12 *ex parte*) at 2. The Hawaii Commission disagreed. See Letter from Paul Shigenaga, Hawaii Commission, to Magalie Roman Salas, dated Aug. 10, 1998. Sandwich Isles subsequently sought designation as an ETC by the Hawaii Commission, which was granted on Dec. 9, 1998. See Sandwich Isles Nov. 12 *ex parte*, at 3 n.4; Letter from Sylvia Lesse, Counsel for Sandwich Isles, to Magalie Roman Salas, FCC, dated Dec. 22, 1998 (Sandwich Isles Dec. 22 *ex parte*) Exhibit 1 (Hawaii Commission Decision and Order granting Sandwich Isles ETC status).

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n36 According to USAC's most recent projections Sandwich Isles receives annually, approximately \$ 5.4 million in high-cost loop support, \$ 1.5 million in local switching support, and \$ 7 million in interstate common line support. Sandwich Isles serves 1,059 lines and its total high-cost support of almost \$ 13.9 million amounts to more than \$ 13,000 per loop, per year. See USAC Quarterly Administrative Filing 2004, Third Quarter (3Q) Appendices, HC01, HC05, at <http://www.universalservice.org/overview/filings>.

[\*22273]

10. Although we grant Verizon Hawaii's Application for Review and reverse the Bureau's decision in *Sandwich Isles*, we do not necessarily agree with Verizon Hawaii that Sandwich Isles should be treated as a competitive ETC, rather than as an incumbent LEC, for purposes of receiving universal service support and part 69 of the Commission's rules. n37 Accordingly, we will provide Sandwich Isles the opportunity to seek a study area waiver. To ensure continued service to Sandwich Isles' customers, we will continue to treat Sandwich Isles as an incumbent LEC for purposes of receiving universal service support until the Commission rules on a request for a study area waiver, [\*\*16] provided that Sandwich Isles file such request within 60 days of the effective date of this Order.

n37 See Application for Review at 12-13; Opposition to Petition at 8 n.4; 11-12.

#### IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 254, and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that this MEMORANDUM OPINION AND ORDER is ADOPTED.

12. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 254, and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that the Application for Review filed by GTE Hawaiian Telephone Company Incorporated ON March 5, 1998 is GRANTED.

13. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 254, and section 1.115 [\*\*17] of the Commission's rules, 47 C.F.R. § 1.115, that the decision of the Common Carrier Bureau, *Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification*, Order, AAD 97-82, 13 FCC Rcd 2407 (Acct. Aud. Div. 1998) is REVERSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

CONCUR BY:



COPPS

**CONCUR:**  
[\*22274]

**STATEMENT OF COMMISSIONER MICHAEL J. COPPS, CONCURRING**

*Re: GTE Hawaiian Telephone Company, Inc. Application for Review of a Decision by the Common Carrier Bureau, Sandwich Isles Communications, Inc. Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification (AAD 97-82)*

In 1998, the Common Carrier Bureau concluded that for regulatory purposes it would treat Sandwich Isles Communications' service territory as a study area. Shortly after the Bureau released its decision, GTE Hawaiian Telephone Company filed an application for review by the full Commission, contending that the service area at issue was within its serving territory. Incomprehensibly, this dispute has sat in front of the Commission for six years. I support today's decision. But I limit [\*\*18] my support to concurring because fairness requires that we resolve issues involving support for unserved areas and disputed territory with greater speed than we attempt to do here. I can only hope that a fuller record in a subsequent study area waiver proceeding will bring an equitable solution for all.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Administrative LawJudicial ReviewReviewabilityStandingCommunications LawTelephone ServicesLocal Exchange CarriersTariffsCommunications LawU.S. Federal Communications CommissionGeneral Overview

TAB 3

LEXSEE

In the Matter of Sandwich Isles Communications, Inc.; Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary and Sections 36.611, and 69.2(hh) of the Commission's Rules

CC Docket No. 96-45

**RELEASE-NUMBER:** DA 05-1355

FEDERAL COMMUNICATIONS COMMISSION

20 FCC Rcd 8999; 2005 FCC LEXIS 2825

May 16, 2005, Released; May 16, 2005, Adopted

**CORE TERMS:** incumbent, universal, high-cost, carrier, unserved, public interest, loop, competitive, tariffs, Commission's Rules, telecommunications, network, pools, new study, customers, territory, guideline, purposes of calculating, providing service, adverse impact, infrastructure, subscriber, switching, freeze, Communications Act, rural, one-percent, interstate, waive, special circumstances

**ACTION:**

[\*\*1] ORDER

**JUDGES:** By the Acting Chief, Wireline Competition Bureau

**OPINION BY:** NAVIN

**OPINION:**

[\*8999]

**I. INTRODUCTION**

1. In this Order, we grant a request from Sandwich Isles Communications, Inc. (Sandwich Isles) for waiver, *nunc pro tunc*, n1 of the study area boundary freeze codified in the Appendix-Glossary of Part 36, and sections 36.611 and 69.2(hh) of the Commission's rules. n2 Sandwich Isles filed its Petition in response to the Commission's recent decision reversing a decision by the Common Carrier Bureau (Bureau) that had granted Sandwich Isles a waiver to be treated as an incumbent local exchange carrier (LEC) serving previously "unserved" areas of the Hawaiian home lands for purposes of receiving high-cost universal service support. n3 We also grant Sandwich Isles a waiver of the definition of incumbent [\*9000] LEC in Part 36 and in section 54.5 of the Commission's rules to the limited extent necessary to permit Sandwich Isles to receive universal service support based on its own costs. These waivers will permit Sandwich Isles to continue being treated as an incumbent LEC for purposes of receiving universal service support and participating in the National Exchange Carrier Association (NECA) tariffs and pools.

n1 The term *nunc pro tunc*, meaning "now for then," refers to acts allowed to be done after the time when they should be done, with a retroactive effect. See BLACK'S LAW DICTIONARY 1069 (6th ed. 1990).

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n2 Sandwich Isles Communications, Inc., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary and Sections 36.611, and 69.2(hh) of the Commission's Rules, CC Docket No. 96-45, filed December 27, 2004 (Petition). On January 18, 2005, the Wireline Competition Bureau released a Public Notice seeking comment on the Petition. *Sandwich Isles Communications, Inc. Seeks Waiver Nunc Pro*

*Tunc of the Definition of "Study Area" in Part 36 And Sections 36.611 and 69.2(hh) [of the] Commission's Rules*, CC Docket No. 96-45, Public Notice, DA 05-105 (rel. Jan. 18, 2005). Comments were filed February 8, 2005, and reply comments were filed February 22, 2005.

n3 *GTE Hawaiian Telephone Company, Inc.*, AAD 97-82, Memorandum Opinion and Order, FCC 04-256, 19 FCC Rcd 22268 (2004) (*Verizon Hawaii Order*), reversing *Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification*, Order, AAD 97-82, 13 FCC Rcd 2407 (Acct. Aud. Div. 1998) (*Sandwich Isles Order*). Verizon Hawaii was the successor to GTE, which previously provided telephone service in the state of Hawaii. The Carlyle Group's Hawaiian Telcom Communication's Inc. (Hawaiian Telcom) recently acquired Verizon Hawaii. (The Common Carrier Bureau subsequently became the Wireline Competition Bureau.) Prior to the Commission's *Skyline Order*, discussed below, the Commission had not defined "unserved" areas for purposes of the study area waiver requirements or requests for waivers of 36.611, and the Bureau determined whether or not an area was unserved on a case-by-case basis. See *M&L Enterprises, Inc., d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612, and 69.2(hh) of the Commission's Rules*. CC Docket No. 96-45, Order, FCC 04-86, 19 FCC Rcd 6761 (*Skyline Order*); see *infra* para. 7. In the *Skyline Order*, the Commission determined that the area served by Skyline Telephone was within the Qwest and Verizon study areas and, therefore, a study area waiver request should have been filed. Qwest and Verizon had no facilities or customers in the area, but the Commission clarified that the area was not "unserved" for purposes of the study area waiver requirement. See *Skyline Order*, 19 FCC Rcd at 6766-68, paras. 11-18.

## [\*\*3] II. BACKGROUND

### A. Procedural History

2. Sandwich Isles is a native Hawaiian owned company licensed by the Department of Hawaiian Home Lands to construct and operate a modern telecommunications network serving the Hawaiian home lands. n4 On July 8, 1997, Sandwich Isles filed a petition requesting a waiver of section 36.611 of the Commission's rules to permit it to receive high-cost loop support based on projected costs until historical costs became available. n5 Sandwich Isles said that it was a new LEC that would be providing service to previously unserved portions of the Hawaiian home lands. Sandwich Isles also sought clarification or, to the extent necessary, waiver of the Commission's definition of incumbent LEC for purposes of calculating universal service support and Part 69 of the Commission's rules. Sandwich Isles claimed it was not required to seek a study area waiver. n6

n4 The Hawaiian home lands consist of approximately 70 non-contiguous parcels of land, which total 203,500 acres, on the six major Hawaiian Islands, and are administered by the State of Hawaii, Department of Hawaiian Home Lands. Petition at 2.

n5 Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules and request for Clarification, AAD 97-82, filed July 8, 1997 (1997 Petition).

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n6 See *id.* at 2 n.3. Sandwich Isles relied on a 1996 Bureau order that held that carriers are not required to seek study area waivers if a separately incorporated company is establishing a study area for a previously unserved area. See *Request for Clarification filed by the National Exchange Carrier Association, Inc., and Petitions for Waiver Filed by Alaska Telephone Company, Ducor Telephone Company, and Kingsgate Telephone, Inc., Concerning the Definition of "Study Area" in the Part 36 Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, AAD 95-175, AAD 96-29, AAD-96-51, 11 FCC Rcd 8156, 8160, para. 9 (Com. Car. Bur. 1996) (*Study Area Waiver Exceptions Order*), *erratum*, 11 FCC Rcd 8646 (Acct. Aud. Div. 1996).

3. On February 3, 1998, the Bureau granted in large part Sandwich Isles' 1997 Petition. n7 Specifically, the Bureau granted Sandwich Isles a waiver of section 36.611 of the Commission's rules to the extent necessary to permit it to receive high-cost loop support for the period January 1, 1998 through December 31, 1999 based initially on projected costs followed by quarterly true-ups using [\*\*5] actual costs. n8 In addition, the Bureau waived the incumbent LEC requirements of Part 36 and 69 of the Commission's rules to permit Sandwich Isles to receive high-cost loop support

based on its costs and to become a [\*9001] member of the NECA. n9 In addition, the Bureau said that "for regulatory purposes we will recognize Sandwich Isles' service territory in Hawaii as a study area" n10

n7 The Bureau denied Sandwich Isles' request for a waiver to allow it to receive high-cost loop support for the period December 2, 1997 to December 31, 1997. *Sandwich Isles Order*, 13 FCC Rcd at 2411.

n8 *Id.*

n9 *Id.* at 2413.

n10 *Id.* The Bureau apparently agreed with Sandwich Isles that a study area waiver was not necessary based on the *Study Area Waiver Exceptions Order*, but cited the *erratum*, not the underlying order. *See id.* at 2413 n. 36; *supra* note 6.

4. On October 29, 2004, the Commission reversed the Bureau's decision. n11 The Commission concluded that the Bureau had erred by ignoring evidence in the record that the areas Sandwich Isles proposed to serve were not "unserved" for [\*\*6] purposes of the study area waiver requirement. n12 The Commission found that the exchanges served by Sandwich Isles were within the study area of GTE Hawaiian Telephone Company (GTE) (subsequently Verizon Hawaii). n13 Consistent with Commission precedent in its *Skyline Order*, n14 the Commission required Sandwich Isles to seek and obtain a study area waiver in order to continue being treated as an incumbent LEC for purposes of receiving universal service support. n15

n11 *Verizon Hawaii Order*, 19 FCC Rcd 22268.

n12 *Id.* at 22270, para. 7. As noted above, the Commission had not defined "unserved" areas for purposes of the study area waiver requirements prior to its *Skyline Order*. In the *Skyline Order*, the Commission found that an area without facilities or customers was not "unserved" for these purposes, because it was within two other carriers' study areas. *See supra* note 3.

n13 *Id.* at 22272, para. 9.

n14 *Skyline Order*, 19 FCC Rcd at 6766-67, paras. 11-13. In the *Skyline Order*, the Commission clarified that a study area waiver request must be filed with the Commission where a company is seeking to create a new study area from within one or more existing study areas. The Commission further provided that any such waiver request would be evaluated under the criteria set forth in the *PTI/Eagle Order*. *Id.* at 6766, para. 13. *See also infra* note 26 & accompanying text; *Verizon Hawaii Order*, 19 FCC Rcd at 22272, para. 9 & n.33.

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n15 *Verizon Hawaii Order*, 19 FCC Rcd at 22271-73, paras. 8-10. The Commission provided that Sandwich Isles would continue to be treated as an incumbent LEC for purposes of receiving universal service support until the Commission rules on the request for a study area waiver, provided that Sandwich Isles filed such request within sixty days of the effective date of the *Verizon Hawaii Order*. *Id.* at 22273, para. 10.

5. On December 27, 2004, Sandwich Isles requested that the Commission "reestablish its study area as the Hawaiian home lands and grant related rule waivers necessary to allow it to receive interstate access and universal service support based on its own cost." n16 Sandwich Isles filed its Petition without prejudice to its position that no study area waiver is necessary, and argues that the Hawaiian home lands were not included in GTE's study area and are not now included in Verizon Hawaii's study area. n17 Notwithstanding this claim, Sandwich Isles also requests a study waiver in accordance with the Commission's *Verizon Hawaii Order*.

n16 Petition at iii.

n17 *Id.* at 1-14. Sandwich Isles asserts that the Bureau's Order was correct, generally relying on the same arguments previously made to the Commission. To the extent that Sandwich Isles wanted the Commission to reconsider *Verizon Hawaii Order*, it should have sought reconsideration of that decision. The Bureau does not have the authority to alter the Commission's finding that the exchanges served by Sandwich Isles were within

GTE's study area. See *Verizon Hawaii Order*, 19 FCC Rcd at 22272, para. 9. Sandwich Isles also states that it presents facts supporting its assertion that were not considered by the Commission. To the extent that certain arguments were not addressed by the Commission, they present new and novel issues that are beyond the scope of the Bureau's delegated authority.

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## B. Commission Precedent

6. *Study Area*. A study area is a geographic segment of an incumbent LEC's telephone operations. Generally, a study area corresponds to an incumbent LEC's entire service territory within a state. The Commission froze all study area boundaries effective November 15, 1984. n18 The Commission took this action to prevent the establishment of high-cost exchanges within existing service territories as separate study areas merely to maximize high-cost support. A carrier must therefore apply to the Commission for a waiver of the study area boundary freeze if it wishes to sell or purchase additional exchanges. n19 In addition, as determined in the *Skyline Order*, a carrier must apply for a study area waiver if it seeks to create a new study area from within an existing study area.

n18 See *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 50 Fed. Reg. 939 (1985) (*Part 67 Order*), adopting Recommended Decision and Order, 49 Fed. Reg. 48325 (1984). See also 47 C.F.R. Part 36, App.

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n19 *Part 67 Order* at para. 1.

7. *Skyline Order*. Skyline Telephone Company (Skyline) sought a waiver of the Commission's rules to enable it to receive accelerated high-cost loop support and to participate in NECA pools and tariffs. n20 The exchanges for which Skyline sought support were within the Qwest and Verizon study areas. n21 Skyline asserted that it was not required to seek a study area waiver in order to receive support for a newly formed study area because its exchanges constituted a previously unserved area. n22 The Commission rejected that argument, explaining that it had never enunciated an exception to its study area waiver requirements for unserved areas, nor had the term "unserved" been defined for purposes of the study area waiver requirements specifically, or Part 36 of the Commission's rules, more generally. n23 The Commission concluded that treating an area as unserved when it was previously within an existing study area would be inconsistent with the purpose of the study area freeze, and that Skyline required a study area waiver. n24 The Commission clarified that a study area waiver request must be filed with the Commission where a company is seeking [\*\*10] to create a new study area from within one or more existing study areas. n25 The Commission further provided that any such waiver request will be evaluated under the criteria set forth in the *PTI/Eagle Order* n26 to ensure that the Commission has an opportunity to determine whether the creation of a new study area will have an adverse impact on the federal universal service fund. n27

n20 The Commission dismissed as moot Skyline's request for waiver of sections 36.611 and 36.612 of the Commission's rules. *Skyline Order*, 19 FCC Rcd at 10, paras. 22-23.

n21 *Id.* at 6766-67, paras. 11-13.

n22 Skyline relied on the *Study Area Waiver Exceptions Order*. *Id.* at 6765-66, para. 10 & n.33; *Study Area Waiver Exceptions Order*, 11 FCC Rcd at 8160, para. 9; see *supra* note 6.

n23 *Skyline Order*, 19 FCC Rcd at 6766, para. 11.

n24 *Id.*; see also *MTS and WATS Market Structure; Establishment of a Joint Board; Amendment*, Decision and Order, CC Docket Nos. 78-72, 80-286, FCC 84-637, 50 Fed. Reg. 939 (1985) (*1985 Order Adopting Joint Board Recommendation*); *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, Recommended Decision and Order, CC Docket Nos. 78-72, 80-286, 49 Fed. Reg. 48325 (1984) (*1984 Joint Board Recommended Decision*); 47 C.F.R. Part 36 App.

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n25 *Skyline Order*, 19 FCC Rcd at 6766-67, para. 13.

n26 *US WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, AAD 94-27, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1772 para. 5 (1995) (*PTI/Eagle Order*).

n27 *Skyline Order*, 19 FCC Rcd at 6766-67, para. 13.

[\*9003]

8. *Standards for Waiver*. Generally, the Commission may waive its rules for good cause shown. n28 The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. n29 In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. n30 Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest. In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the [\*\*12] Commission traditionally has applied a three-prong standard set forth in the *PTI/Eagle Order*: (1) the change in study area boundaries must not adversely affect the universal service fund; (2) no state commission having regulatory authority over the transferred exchanges opposes the transfer; and (3) the transfer must be in the public interest. n31

n28 47 C.F.R. § 1.3.

n29 *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

n30 *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*), cert. denied, 409 U.S. 1027 (1972); *Northeast Cellular*, 897 F.2d at 1166.

n31 See, e.g., *PTI/Eagle Order*, 10 FCC Rcd at 1772 para. 5; *Skyline Order*, 19 FCC Rcd at 6767, paras. 14-18.

9. In evaluating whether a study area boundary change will have an adverse impact on the universal service fund, the Commission has considered whether a study area waiver will result in an annual aggregate shift in an amount equal to or greater than one percent [\*\*13] of total annual high-cost support. n32 The Commission began applying the one-percent guideline in 1995 to limit the potential adverse impact of exchange sales on the overall fund, also recognizing that, because high-cost loop support is capped, an increase in the draw of any fund recipient necessarily reduces the amounts that other LECs receive from the fund. n33 After adoption of section 54.305 of the Commission's rules, the one percent guideline was not, in practice, a necessary limitation for most study area waivers with respect to high-cost loop support and local switching support, because section 54.305 provides that a carrier purchasing exchanges from an unaffiliated carrier is permitted to receive only the same level of per-line high-cost support that the selling company was receiving for the exchanges prior to the transfer. n34 The Commission determined in the *Skyline Order*, however, that section 54.305 did not apply because there was no sale or transfer of facilities, and no customers were affected by the creation of a new study area. n35 As in the *Skyline Order*, Sandwich Isles has not acquired exchanges from another carrier and thus section 54.305 does not apply. [\*\*14]

n32 *PTI/Eagle Order* at 1774, paras. 14-17. See *US WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, and Petition for Waiver of Section 61.41(c) of the Commission's Rules*, AAD 94-27, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 4644 (1997).

n33 See *PTI/Eagle Order* 10 FCC Rcd at 1773-74, paras. 13-15.

n34 See 47 C.F.R. § 54.305(b). By definition, section 54.305(b) ensures that there will be no adverse impact on the universal service fund with respect to high-cost loop support and local switching support. A carrier's acquired exchanges may receive additional support pursuant to the Commission's "safety valve" mechanism. See 47 C.F.R. § 54.305(d)-(f). Moreover, a carrier acquiring exchanges may be eligible to receive Interstate Common Line Support (ICLS), which is not subject the limitations set forth in section 54.305(b). See 47 C.F.R. § 54.902. Accordingly, the Commission continues to apply the one-percent guideline to evaluate the potential impact safety valve support and ICLS on the universal service fund. See, e.g., *Sioux Valley Telephone Company*



*and Hills Telephone Company, Inc., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Petition for Waiver of Section 69.605(c) of the Commission's Rules*, CC Docket No. 96-45, DA 05-1097 (Wireline Comp. Bur., released April 19, 2005).

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n35 *Skyline Order*, 19 FCC at 6767-68, para. 16.

[\*9004]

### C. The Petition For Waiver

10. Sandwich Isles argues that grant of its Petition would be consistent with the Commission's criteria set forth in the *PTI/Eagle Order*. First, based on the Universal Service Administrative Company's (USAC's) first quarter 2005 projections, Sandwich Isles states that its total high-cost support for the year will be less than four-tenths of one percent. n36 Second, Sandwich Isles states that the Department of Hawaiian Home Lands and the Hawaii Public Utilities Commission (Hawaii Commission) have not expressed any opposition to a grant of the waivers requested. n37 Third, Sandwich Isles argues that the Commission has repeatedly recognized a strong public interest benefit where a new carrier offers significant improvements in service. Sandwich Isles also claims that it has unique special circumstances. n38

n36 *See* Petition at 18 & n.57.

n37 *Id.* at 18.

n38 *Id.* at 19-22.

11. With respect to special circumstances, Sandwich Isles states that it has been steadily investing large amounts of capital to construct state-of-the-art facilities to provide [\*\*16] service on the Hawaiian home lands in reliance on the now-reversed Bureau order since 1998. n39 As a result of the combination of \$ 166 million in capital funding from the Rural Utilities (RUS), and cost recovery through participation in NECA access tariffs and pools, and universal service support, Sandwich Isles states that it has been able to extend service to over 4,000 new lots and almost 1,200 access lines in 20 new communities, and expects to expand service to an additional 14 communities during 2005. n40 Sandwich Isles recently submitted a multimillion dollar broadband loan application to RUS for new construction that "includes additional switching facilities to serve new [Hawaiian home lands] subdivisions; deploy additional [asymmetric digital subscriber line] ADSL equipment, and comply with the [Communications Assistance for Law Enforcement Act of 1994 n41] CALEA requirements; local outside distribution facilities estimated to pass another 2,500 lots; completion of the terrestrial underground fiber transport network; and a network operations and switching center complex." n42 Sandwich Isles argues that these construction plans, along with the provision of telecommunications [\*\*17] services to more than 1,000 existing customers that did not previously have service demonstrates that a study area waiver serves the public interest. n43 In addition, Sandwich Isles contends that its Petition presents unique public interest factors. In particular, Sandwich Isles claims that it plays a critical role in providing modern telecommunications to native Hawaiians on native land. n44

n39 *Id.* at 19.

n40 *Id.*

n41 Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in 18 U.S.C. §§ 2522, 3121, and 47 U.S.C. §§ 229, 1001-1010).

n42 Petition at 20.

n43 *Id.*

n44 *Id.* at 21. Sandwich Isles asserts that, although the state of Hawaii has primary responsibility as fiduciary for the Hawaiian home lands, the United States retains a duty to ensure that the state meets its trust responsibilities. The Bureau finds that a grant of the study area waiver would serve the public interest under the Commission's applicable test without needing to address this issue.



12. Sandwich Isles states that denial of its Petition would [\*\*18] reduce it to competitive carrier status thereby eliminating most of its interstate access revenue and all of its universal service support, [\*9005] which would result in unaffordable rates in the Hawaiian home lands and create a serious risk of default on its RUS loans. n45

n45 *Id.* at 21-22. If Sandwich Isles were treated as a competitive ETC, it would receive the same per-line support that Verizon Hawaii receives, rather than support based on Sandwich Isles' own costs. *See* 47 C.F.R. § 54.307.

13. Hawaiian Telcom did not object to Sandwich Isles' Petition, but did identify several issues which we address below. n46 Verizon encouraged the Commission to limit any order on the waiver request to the facts of this case, and argued that certain issues, such as controlling the growth of the fund, should be addressed in the context of broader rulemaking proceedings. n47 The majority of other commenters, however, supported Sandwich Isles' Petition. n48

n46 Hawaiian Telcom Comments. Hawaiian Telcom's comments were filed prior to its acquisition of Verizon Hawaii and stated that it did not possess all the relevant information. Hawaiian Telcom "neither supports nor opposes the Petition at this time, but urges the Commission to rigorously evaluate the public policy implications of the Petition." *Id.* at 1-2.

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n47 Verizon Comments. Because "the Commission already has made findings regarding the relevant facts at issue in this petition," Verizon stated that it would not revisit them here. Several commenters supporting Sandwich Isles' Petition argue that the Bureau's order was correct, that the GTE study area never included the Hawaiian home lands, and that study areas are not required when carriers create new study areas to serve previously unserved areas. *See, e.g.,* CHR Solutions, Inc. Comments at 2; GVNW Consulting, Inc. Comments at 7; Pacific LightNet Inc. Comments at 2-3; TCA, Inc. -- Telcom Consulting, Inc. Comments at 2; Western Telecommunications Alliance Comments at 4. The Commission's *Skyline Order* and *Verizon Hawaii Order* rejected these claims.

n48 *See, e.g.,* Fred Williamson and Associates, Inc. Comments; National Telecommunications Cooperative Association (NTCA) Comments; Organization for the Protection and Advancement of Small Telecommunications Companies (OPATSCO) Comments.

### III. DISCUSSION

#### A. Study Area Waiver

14. We find that good cause exists to waive the study area boundary freeze codified in the Appendix-Glossary of Part 36 of the Commission's [\*\*20] rules as set forth herein. For the reasons discussed below, we conclude that the petitioners have satisfied the three-prong standard that the Commission applies to determine whether a study area waiver is warranted.

15. *Geographic Scope of the Study Area Waiver.* As a preliminary matter, we must identify the scope of the study area waiver we are granting. n49 We find that the study area we grant herein should be limited to only those areas where there were no facilities or service on the Hawaiian home lands in 1997, *i.e.,* the areas that Sandwich Isles claimed were unserved in its 1997 Petition. n50 First, the scope of [\*9006] this proceeding, and both the Bureau's 1998 order and the Commission's 2004 order, were limited to those areas. In fact, had Sandwich Isle's original 1997 Petition included areas actually served by another carrier, that would likely have affected the outcome of the Bureau order and all consequent Commission actions. Second, to grant Sandwich Isles a study area that encompasses territory that is already being served by an incumbent LEC would require the Commission to determine whether Sandwich Isles should be deemed an incumbent LEC under section 251(h)(2) [\*\*21] of the Act, which raises issues that the Commission is addressing in another proceeding. n51 In any event, we note that the portion of the Hawaiian home lands that falls outside the scope of our study area waiver appears to be less than one percent of the Hawaiian home lands. n52

n49 Most study area waiver requests involve sales of exchanges and are jointly filed by the selling and acquiring carriers. In the *Skyline Order*, the Commission granted a study area waiver on its own motion, but Qwest

and Verizon had filed study area boundary changes with the Washington Utilities and Transportation Commission to create a new study area for Skyline Telephone. *Skyline Order*, 19 FCC Rcd 6763-64, 6767, paras. 5-6, 14.

n50 See 1997 Petition at 5. Hawaiian Telcom contends that there is ambiguity as to whether the waiver request is for the entire Hawaiian home lands, or only the previously "unserved" portions of the Hawaiian home lands. Hawaiian Telcom Comments at 4-5. At times, Sandwich Isles seems to ask the Commission to reaffirm only its study area that had been previously recognized by the Bureau. See, e.g., Petition at iii, 9. In other instances, however, Sandwich Isles asks that the study area boundaries encompass the entire Hawaiian home lands and that the Commission "adjust the study area of Verizon Hawaii, Inc. to the extent necessary." Petition at 2. Significantly, both the Bureau's 1998 order and the Commission's 2004 order related only to the areas that Sandwich Isles claimed were without facilities or service when Sandwich Isles filed its 1997 Petition. See *Sandwich Isles Order*, 13 FCC Rcd at 2409, 2411, paras. 5, 11; *Verizon Hawaii Order*, 19 FCC Rcd at 22270-71, para. 7.

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n51 See 47 U.S.C. § 251(h)(2); *Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring It To Be an Incumbent Local Exchange Carrier In Terry, Montana Pursuant to Section 251(h)(2)*, WC Docket No. 02-78, Notice of Proposed Rulemaking, 19 FCC Rcd 23070 (2004) (*Mid-Rivers NPRM*) (considering, *inter alia*, whether to designate a carrier as an incumbent LEC in a territory where another incumbent LEC actually provides service).

n52 See Sandwich Isles Reply Comments at 9. ("The fact that prior to the grant of Sandwich Isles['] license by [the Department of Hawaiian Home Lands], GTE was providing service to subscribers in a few areas near its existing exchanges comprising less than one percent of the total [Hawaiian home lands], is not evidence that it was ready, willing or able to serve the other 99% of the [Hawaiian home lands].").

16. *Impact on the Fund.* Applying the one-percent guideline, we conclude that the universal service fund will not be adversely affected. Based on USAC's most recent projections, Sandwich Isles' total high-cost support for the year is estimated to be 0.42 [\*\*23] percent of total annualized high-cost support. n53 Hawaiian Telcom argues that we should also consider the impact on the fund resulting from Sandwich Isles' and the Department of Hawaiian Home Lands' future plans. n54 Hawaiian Telcom also argues that we should factor in support received by competitive eligible telecommunications carriers (ETCs) serving Sandwich Isles' service territory. According to Hawaiian Telcom, this would increase the impact on the fund to 0.67 percent of the total annual high-cost support. n55 Hawaiian Telcom claims that other competitive ETCs will no doubt seek support based on Sandwich Isles' costs and that the total impact will rapidly surpass the one percent threshold in the near future. n56 Parties must demonstrate "extraordinary public interest considerations" to warrant exceeding the one-percent guideline. n57

n53 According to the Universal Service Administrative Company's (USAC's) most recent projections Sandwich Isles receives annually, approximately \$ 7.4 million in high-cost loop support, \$ 1.9 million in local switching support, and \$ 8 million in interstate common line support. Sandwich Isles serves 1,238 lines and its total high-cost support of almost \$ 17.3 million amounts to almost \$ 14,000 per loop, per year. Sandwich Isles' total annual support based on these estimates is 0.42 percent of total high-cost support. See USAC Quarterly Administrative Filing 2005, Third Quarter (3Q) Appendices, HC01, HC05, filed May 2, 2005, at <http://www.universalservice.org/overview/filings>.

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n54 Hawaiian Telcom Comments at 7 n.26 (citing Petition's statement that the Department of Hawaiian Home Lands expects to increase the number of residents on the Hawaiian home lands to approximately 20,000).

n55 *Id.* at 7.

n56 *Id.*

n57 See *PTI/Eagle Order*, 10 FCC Rcd at 1774, para. 17.

17. In applying the one-percent guideline, the Commission looks at the estimated support on an annualized basis at the time the waiver request is submitted, and does not attempt to estimate future support amounts. n58 Accordingly, we will not attempt to estimate the amount of universal support [\*9007] Sandwich Isles may receive in the future. Moreover, although the Commission has expressed its concern that multiple ETCs in high-cost areas could impose strains on the universal service fund in other contexts, n59 it has never included support to competitive ETCs in determining whether the requested study area waiver would have an adverse impact on the fund. While the Commission has found that high perline support received by the incumbent LEC should be one consideration in designating additional ETCs, n60 it has not considered per-line support amounts in considering [\*\*25] requests for study area waivers, and we therefore do not do so here. Accordingly, we find that, applying our existing guidelines, the requested study area waiver will not have an unacceptable adverse impact on the fund.

n58 *See id.* The Commission has in the past, however, granted study area waivers subject to the condition that any increase in universal service associated with a sale of exchanges may not exceed the amount estimated at the time. *See e.g., id.* at 1774-75, para. 20. That limitation was subsequently removed, as were all remaining individual caps on high-cost loop support that had been imposed as part of the grant of study area waivers. *See Petitions for Waiver Concerning the Definition of "Study Area" Contained in Part 36 Appendix-Glossary of the Commission's Rules, Accent Communications, Inc. et al., Order, CC Docket 96-45, 15 FCC Rcd 23491 (Com. Car Bur. 2000); Petitions for Waiver and Reconsideration Concerning Sections 36.611, 36.612, 61.41(c)(2), 69.605(c), 69.3(e)(110 and the Definition of "Study Area" Contained in Part 36 Appendix-Glossary of the Commission's Rules, Filed by Copper Valley Telephone Company, et al., Memorandum Opinion and Order on Reconsideration, DA 99-1845 (Com. Car. Bur. 1999).*

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n59 *See Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, FCC 05-46, at para. 55 (rel. March 17, 2005) (ETC Designation Framework Order).*

n60 *See id.*

18. *Position of State Commission.* The state agencies with regulatory authority over Sandwich Isles do not oppose grant of the study area waiver. On December 23, 2004, the Department of Hawaiian Home Lands sent a letter to the Commission stating that it fully supports Sandwich Isles continuing to provide telecommunications services on Hawaiian home lands. n61 The Hawaii Commission sent a letter to the Commission on January 7, 2005, stating that it does not oppose a grant of the waiver of the definition of "Study Area" requested by Sandwich Isles, consistent with actions previously taken in granting Sandwich Isles a Certificate of Authority, designating it an ETC, and annually certifying, since 2001, that it should continue to receive federal high-cost support funds. n62

n61 Letter from Micah A. Kane, Chairman, Hawaiian Homes Commission, to Marlene H. Dortch, FCC, dated Dec. 23, 2004, Petition at Appendix D (Hawaiian Homes Commission letter).

n62 Letter from Carlito P. Caliboso, Chairman, Hawaii Commission, to Marlene H. Dortch, FCC, dated Jan. 10, 2005. The Hawaii Commission designated Sandwich Isles an ETC on Dec. 9, 1998. *See id.* at 1. The Department of Hawaiian Home Lands granted Sandwich Isles ETC status on May 14, 1997. *See* Petition at 5. We need not decide the date on which Sandwich Isles received ETC designation in order to decide the study area waiver petition.

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19. *Public Interest Analysis.* The public interest is served by a waiver of the study area freeze rule to recognize Sandwich Isles' service territory on the Hawaiian home lands as a study area for regulatory purposes because of the significant investment to provide service in areas and to customers that did not previously have service. According to the most recent information filed with the Commission, Sandwich Isles currently has telecommunications facilities passing 4,300 lots on the Hawaiian home lands and expects to pass another 1,500 lots over the next two years. n63 Sandwich Isles expects to have approximately 1,700 subscribers by the end of this year, and approximately 4,600 subscribers by the end of 2009. n64 Sandwich Isles' construction schedule involves deploying backbone switching and transport infrastructure as well as local distribution facilities to serve the residents of the Hawaiian home lands. n65 Construction of backbone infrastructure began in earnest in 2000, with RUS approval of funding for a comprehensive network design

that will connect all of the Hawaiian home lands on all six of the major [\*9008] Hawaiian Islands. n66 With continued RUS loan funds, Sandwich Isles expects to complete the majority of its terrestrial network by the end of 2006. n67 Although Sandwich Isles does not have firm data on the number of potential subscribers, it notes that the Department of Hawaiian Home Lands has a waiting list of approximately 20,000 native Hawaiians who have applied for lots. n68

n63 Letter from David Cosson, Counsel to Sandwich Isles, to Marlene H. Dortch, FCC, dated April 25, 2005, at 1 (Sandwich Isles April 25, 2005 *ex parte*).

n64 *Id.*

n65 *Id.*

n66 *Id.*

n67 *Id.*

n68 *Id.* at 2.

20. Hawaiian Telcom contends that it is far from clear that granting Sandwich Isles' Petition will serve the public interest because Sandwich Isles is not the only party capable of providing service to the Hawaiian home lands. n69 Hawaiian Telcom argues that the Commission should consider whether Sandwich Isles is the service provider best able to maximize the use of high-cost support for the public benefit. n70 In addition to the service currently provided by the competitive ETC, NPCR, Inc., d/b/a Nextel Partners, Hawaiian Telcom asserts that Verizon Hawaii has provided service to portions of the Hawaiian home lands and "apparently [\*\*29] retains the capacity to provide such service today." n71 Hawaiian Telcom disputes Sandwich Isles' claim that the Hawaiian home lands would have remained unserved if it were not for Sandwich Isles, and claims that GTE was ready, willing, and able to provide service to the Hawaiian home lands when the Bureau granted Sandwich Isles' 1997 Petition. n72 Sandwich Isles claims that GTE had no authority to operate in any area of the Hawaiian home lands not authorized by the Department of Hawaiian Home Lands, and, therefore its study area could not have included the entire Hawaiian home lands. n73

n69 Hawaiian Telcom Comments at 8.

n70 *Id.* at 10.

n71 *Id.* at 8.

n72 *Id.*

n73 Petition at 10.

21. We find that the fact that GTE (later Verizon) may have had authority to serve the Hawaiian home land does not demonstrate that it is not in the public interest to grant a study area waiver to Sandwich Isles. In fact, the record is clear that GTE was not offering service throughout much of the Hawaiian home lands. The record reflects that, at least in the 1990s, GTE was not providing service to residents, or was at best providing multi-party service in the Hawaiian home [\*\*30] lands. n74

n74 *See, e.g., id.* at 2-4; Hawaiian Homes Commission letter at 1-2 ("Prior to issuing [Sandwich Isles] the license, there were many beneficiaries living on [Hawaiian home lands] that did not have phone service due to the high cost either they or [the Department of Hawaiian Home Lands] would have to pay to install the infrastructure. Today these beneficiaries enjoy the same service that is available in urban areas."); Letter from Rep. Robert N. Herkes; Hawaii House of Representatives, to Marlene H. Dortch, FCC, dated Feb. 1, 2005, (noting his experience with the "unavailability and inadequacy" of service provided by GTE and the neglect of rural areas) (Rep. Herkes Letter); Letter from Pikake Pelekai, Ahupua'a o O'ahu, State Council of Hawaiian Homestead Associations, to Marlene H. Dortch, FCC, dated Feb. 1, 2005 at 1 (stating that Sandwich Isles has "helped turn the tide of years of neglect with no or less than adequate service") (Hawaiian Homestead Associations Letter).

22. There is ample evidence to show that granting Sandwich Isles a study area waiver would serve the public interest. Sandwich Isles has demonstrated a commitment to build facilities and extend service [\*\*31] throughout the Hawai-

ian home lands as the Department of Hawaiian home lands develops the area. n75 In evaluating the public interest, the Commission must consider whether the waiver applicant has [\*9009] demonstrated that a grant of the requested waiver will benefit the public, not whether another party theoretically might provide a greater public benefit. Sandwich Isles' subscribers and beneficiaries of its telecommunications services, including many representatives of Hawaiian homestead associations, individual homesteaders, and Hawaiian community and political leaders, sent letters in support of Sandwich Isles' Petition and emphasized the importance of the continued deployment of modern telecommunications infrastructure and services to the residents of the Hawaiian home lands. n76 We find that Sandwich Isles has demonstrated that the grant of this waiver request will serve the public interest.

n75 Petition at 19-20.

n76 See, e.g., Hawaiian Homestead Associations Letter (stating that Sandwich Isles "is creating education, healthcare and economic development opportunities for our homestead communities"); Rep. Herkes Letter at 2 (claiming that Sandwich Isles' presence "has raised the service level bar for all telephone companies as citizens are no longer willing to accept excuses for poor service"); Letter from Vaughn G. A. Vasconcellos, Akimeka, A Native Hawaiian Company, to Commissioners, FCC, dated Jan. 20, 2005 at 1 (arguing the importance of Sandwich Isles' fiber-based backbone network for telemedicine applications in rural Hawaiian home land communities); Letter from Alice Richmond, homesteader, to Marlene H. Dortch, FCC, dated Feb. 1, 2005 (claiming that the availability of communications services is critical to the economic and social feasibility of rural Hawaiian home land communities); Letter from Robin Puanani Danner, Council for Native Hawaiian Advancement, to Marlene H. Dortch, FCC, dated Feb. 1, 2005 (stating that many Hawaiian home land communities are "still without service like high speed Internet connectivity, a basic communication need in a modern world and something with far reaching impacts (access to virtual libraries, telemedicine, educational programming . . .)"); Letter from Daniel K. Kaniho, Jr., to Marlene H. Dortch, FCC, (stating that he and his neighbors in a rural and remote part of the Big Island were without basic, reliable and affordable telephone service for over a decade, prior to 2001); Letter from Frances L. Brand, to Marlene H. Dortch, FCC, dated Jan. 31, 2005 (stating that she does not have access to modern utilities, except Sandwich Isles' telephone service; that she previously paid between \$ 100 and \$ 300 for cellular service; and currently pays a comfortable \$ 26.44); Letter from Raynard C. Soon, former chairman, Hawaiian Homes Commission, to FCC, dated Feb. 1, 2005, ("Before the Commission extended the telecommunications license assigned to Sandwich Isles Communications, single line party line service was not available to many of the Hawaiian Home Land communities and developments throughout the state of Hawaii." . . . Without Sandwich Isles Communications, many of the Hawaiian Home Lands communities that exist today or will be developed in the future would go unserved or be inadequately served.").

[\*\*32]

23. *Other Issues.* Hawaiian Telcom raises several collateral issues that we address below. Hawaiian Telcom argues that there is conflicting evidence in the record of whether or not Sandwich Isles has an "exclusive license" to provide telecommunications services on the Hawaiian home lands. Hawaiian Telcom argues that this raises concerns about whether such a license is a barrier to entry in violation of section 253 of the Communications Act. n77 The Bureau finds that any challenge to a so-called exclusive license is better addressed in the context of a section 253 proceeding. We conclude that this allegation does not affect our determination as to whether the requested study area waiver is in the public interest.

n77 Hawaiian Telcom Comments at 14-15; 47 U.S.C. § 253.

24. Hawaiian Telcom asks the Commission to explore whether Sandwich Isles is using its high-cost support for its intended purposes. n78 Hawaiian Telcom claims there is evidence that Sandwich Isles is using its support for non-core services, because it is constructing an advanced fiber optic network to provide, among other things, high-speed Internet and other advanced services. [\*\*33] In the *Rural Task Force Order*, the Commission stated that "use of support to invest in infrastructure capable of providing access to advanced services does not violate section 245(e). n79 We find no evidence in the record in this proceeding that Sandwich Isles is using universal service support for improper purposes.

n78 Hawaiian Telcom Comments at 12-14.

n79 *Rural Task Force Order*, 16 FCC Rcd 11244, 11322 at para. 200 ("The public switched network is not a single-use network. Modern network infrastructure can provide access not only to voice services, but also to



data, graphics, video, and other services. . . . Thus, although the high-cost loop support mechanism does not support the provision of advanced services, our policies do not impede the deployment of modern plant capable of providing access to advanced services.").

[\*9010]

25. Hawaiian Telcom also suggests that Sandwich Isles is using its high-cost support to construct facilities that may in the future be used to provide service to customers outside the Hawaiian home lands and subsidize a competitive LEC affiliate. Hawaiian Telcom suggests further that Sandwich Isles does not comply with [\*\*34] the Commission's accounting, reporting, and auditing rules. There is no evidence in the record of this proceeding to support these claims. Specifically, we note that the Hawaii Commission has certified annually, since such certification was required, that Sandwich Isles is using its support in accordance with section 254(e) of the Act. n80

n80 *See supra* para. 18.

#### **B. Request to Receive Universal Service Support as an Incumbent LEC and to Participate in NECA Tariffs and Pools**

26. The Commission's rules regarding participation in NECA tariffs and pools, and its rules regarding universal service support for incumbent LECs, do not specifically provide for companies, such as Sandwich Isles, that come into existence after the enactment of the Telecommunications Act of 1996. n81 Sandwich Isles was a newly established carrier that began providing service in 1997, and it is neither a successor nor assign of an incumbent LEC. n82 Therefore, Sandwich Isles does not meet the definition of an incumbent LEC as defined in sections 54.5 and 69.2(hh) of the Commission's Rules and 251(h)(1) of the Act. n83 The Commission's rules in Parts 36, 54, and 69 identify the amount of universal service [\*\*35] support and access charges that incumbent LECs may receive. The purpose of the incumbent LEC restrictions in Parts 36, 54, and 69 is to distinguish competitive LECs from incumbent LECs for purposes of calculating universal service support and access charges, not to impose interconnection requirements pursuant to section 251 of the Act. n84 We find that it is consistent with the Commission's *Skyline Order* [\*9011] and *Verizon Hawaii Order* to waive the definition of incumbent LEC in Part 36, and sections 54.5 and 69.2(hh) of the Commission's rules to the limited extent necessary to permit Sandwich Isles to continue being treated as an incumbent LEC for purposes of receiving universal service support and participating in the NECA tariffs and pools. n85

n81 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The Telecommunications Act of 1996 amended the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* Section 251(h)(1) of the Act defines an "incumbent local exchange carrier" as a provider of telephone exchange service and a member of NECA on the date of enactment of the 1996 Act, or a successor or assign of an incumbent LEC. *See* 47 U.S.C. § 251(h)(1). Incumbent LEC for purposes of Parts 54 and 69 of the Commission's rules has the same meaning as that term is defined in section 251(h)(1) of the Act. *See* 47 C.F.R. §§ 51.5, 54.5, 69.2(hh). Unlike Parts 54 and 69 of the Commission's rules, Part 36 does not include a definition of incumbent LEC. The term "incumbent local exchange carrier" is used throughout Part 36, however, and in some cases references the Commission's definition of rural incumbent LEC in section 54.5 of the Commission's rules. *See, e.g.,* 47 C.F.R. § 36.622(a).

[\*\*36]

n82 *See Sandwich Isles*, 13 FCC Rcd 2409, para. 5; Petition at 2-5. Sandwich Isles' 1997 Petition requested a waiver of section 36.611 of the Commission's rules to permit it to receive high-cost loop support based on projected costs until historical costs became available. *See* 1997 Petition at 7-12. Sandwich Isles also sought clarification or, to the extent necessary, waiver of the definition of incumbent LEC for purposes of calculating universal service support and Part 69 of the Commission's rules. *See* 1997 Petition at 12-14.

n83 Sandwich Isles' pending Petition specifically requests waiver of section 36.611, and 69.2(hh) of the Commission's rules, but also requests that the Commission grant related rule waivers necessary to allow it to receive interstate access and universal service support based on its own cost. *See* Petition at iii, 1, 22-23. Sandwich Isles states that the request for waiver of section 36.611 is moot as to waiver of the historical data requirement on a prospective basis, but requests waiver only to the extent the Commission may conclude that it is necessary to reinstate the Bureau's waiver for the initial period until historical data became available.

[\*\*37]

n84 For purposes of calculating universal service support, Part 36 of the Commission's rules applies to incumbent LECs, and Part 54 of the Commission's rules distinguishes between incumbent LECs and competitive ETCs. A carrier must be an incumbent LEC to receive support based on its own costs. For example, section 36.611 of the Commission's rules governs the submission of data to NECA for purposes of calculating high-cost support and only applies to incumbent LECs. Competitive ETCs file line count data and their support is calculated pursuant to section 54.307 of the Commission's rules. *See* 47 C.F.R. §§ 36.611, 54.307. In order to be a member of NECA and to participate in the NECA tariffs and pools, a carrier must be an incumbent LEC. *See* 47 C.F.R. § 69.2(hh).

n85 *See Verizon Hawaii Order*, 19 FCC Rcd at 22273 ("we do not necessarily agree with Verizon Hawaii that Sandwich Isles should be treated as a competitive ETC, rather than as an incumbent LEC, for purposes of receiving universal service support and part 69 of the Commission's rules."). In the *Verizon Hawaii Order*, the Commission provided Sandwich Isles the opportunity to seek and obtain a study area waiver consistent with the *Skyline Order*. *See id.* at 22271. In the *Skyline Order*, the Commission also waived the definition of incumbent LEC in Parts, 36, 54, and 69 of the Commission's rules to permit Skyline Telephone to receive high-cost universal service support and to participate in NECA pools and tariffs. *Skyline Order*, 19 FCC Rcd at 6771-71, paras. 25-28.

[\*\*38]

27. We grant Sandwich Isles a waiver of the definition of incumbent LEC in Part 36 and in section 54.5 of the Commission's rules to the limited extent necessary to permit Sandwich Isles to receive universal service support based on its own costs. n86 We also grant Sandwich Isles' request for waivers of section 36.611 of the Commission's rules to the extent necessary to reinstate the Bureau's waiver for the initial period until historical cost data became available, and of section 69.2(hh) of the Commission's rules in order to allow the carrier to participate in NECA tariffs and pools. n87

n86 47 C.F.R. Part 36, § 54.5.

n87 Sandwich Isles states that historical data has been regularly filed with NECA and USAC since 1998. Petition at 22.

28. We find that the public interest is served by waiver of the definition of incumbent LEC in Part 36 and in section 54.5 of the Commission's rules for the same reasons we find above that a granting Sandwich Isles a study area waiver serves the public interest. n88 We also conclude that Sandwich Isles has demonstrated that special circumstances warrant a waiver of section 69.2(hh) of the Commission's rules. Participation in NECA will allow [\*\*39] Sandwich Isles to avoid the costs of filing and maintaining its own company-specific interstate tariffs. Because Sandwich Isles is a relatively small company, the costs of preparing company-specific tariffs could be disproportionately excessive. In addition, because Sandwich Isles has made large capital investments to provide service, its company-specific rates have the potential to be extremely high over the long term. Therefore, it is in the public interest to permit Sandwich Isles and its customers to benefit from the cost savings and lower rates available through NECA participation. Waivers of these incumbent LEC requirements will enable Sandwich Isles to continue being treated as an incumbent LEC for purposes of calculating universal service support. Accordingly, we waive the incumbent LEC requirements in Part 36 and sections 54.5 and 69.2(hh) of the Commission's rules to permit Sandwich Isles to participate in NECA pools and tariffs and to receive any high-cost universal service support that it may be eligible to receive. n89

n88 *See supra* paras. 19-22.

n89 Hawaiian Telcom argues that the Commission should consider whether, if the Petition is granted, Sandwich Isles should be reclassified as an incumbent LEC under section 251(h)(2) of the Act. Hawaiian Telcom Comments at 16-17. We reject that argument because it is beyond the scope of Sandwich Isles' petition for study area waiver. Moreover, we note that the instant waiver proceeding employs a substantially different legal standard and analysis than section 251(h)(2) proceedings. 47 U.S.C. § 251(h)(2). For example, in the *Mid-Rivers* proceeding the Commission is considering whether a provider competing against an incumbent LEC has, among other things, substantially replaced that incumbent LEC in the relevant area. *Mid-Rivers NPRM*, 19 FCC Rcd

23070. The inquiry in the instant proceeding is quite different. Here, Sandwich Isles is not providing competing service, but rather was providing service in areas not actually served by the existing incumbent LEC. Accordingly, the factual scenario and applicable legal standard in this case are different from that in Mid-Rivers, and we need not decide whether Sandwich Isles is an incumbent LEC pursuant to section 251(h)(2) of the Act.

**[\*\*40] [\*9012] IV. ORDERING CLAUSES**

29. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, 202 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 202, and 254, and sections 0.91, 0.291 and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the petition for waiver of the study area boundary freeze as codified in Part 36, Appendix-Glossary, of the Commission's rules, filed by Sandwich Isles Communications, Inc. on December 27, 2004, IS GRANTED, as described herein.

30. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291 and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the petition for waiver of sections 36.611, 69.2(hh) of the Commission's rules, 47 C.F.R. §§ 36.611, 69.2(hh), filed by Sandwich Isles Communications, Inc. on December 27, 2004, and the waivers IS GRANTED, as described herein.

31. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications [\*\*41] Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that a waiver of the definition of "incumbent local exchange carrier" in Part 36 and section 54.5 of the Commission's rules to the limited extent necessary to permit calculation of universal service support based on its costs, 47 C.F.R. Part 36, § 54.5, IS GRANTED, to Sandwich Isles Communications, Inc., as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin

Acting Chief, Wireline Competition Bureau

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Communications LawFederal ActsCommunications Assistance for Law Enforcement ActCommunications LawTelephone ServicesLocal Exchange CarriersTariffs



TAB 4

This document is withheld pursuant to the Federal Communications Commission  
Protective Order entered in WC Docket 09-133

TAB 5

This document is withheld pursuant to the Federal Communications Commission  
Protective Order entered in WC Docket 09-133

# TAB 6



# Trends 2009



A report on rural telecom technology

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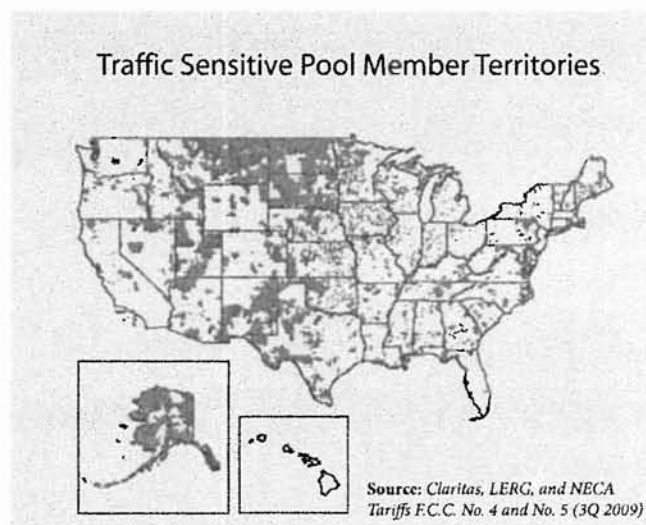
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## INTRODUCTION

It's a broadband world and converging technologies are expanding the opportunities for traditional landline telephone companies. The 1,101 carriers in NECA's Traffic Sensitive (TS) pool are evolving the rural telephone network into an all packet broadband infrastructure that supports voice as well as transmission of high-speed Internet and delivery of video content.

*Trends 2009* demonstrates how TS pool members continue to make progress in deploying broadband services to their customers. Overall broadband availability to customers served by TS pool members is 92 percent. Members use a diverse set of network technologies to meet the demand for advanced services. The evolution of the local switched network from circuit switching to packet routing technology is starting to accelerate as members modernize their local networks to meet their customers' future needs.

For this report, we collected data from 1,101 TS pool members in 47 states, American Samoa and Guam. We gathered information from a variety of sources, including our interstate access tariff participants, our wire center tariff and settlement systems data, as well as periodic surveys targeting specific information. We update and maintain data in an industry database that tracks the progress of network technology deployment in rural America.



**Figure 1**  
**Traffic Sensitive**  
**Pool Member**  
**Territories (in blue)**



## CHARACTERISTICS OF RURAL MARKETS

Each year incumbent local telephone companies can elect to participate in the NECA TS pool or to file their own tariffs. As of July 2009, there were over 4.7 million lines in the TS pool. TS pool members continue to serve a small percentage of total U.S. access lines (3.0 percent), but their service territories cover 37 percent of total U.S. land mass, or close to 1.3 million square miles (see Figure 1).

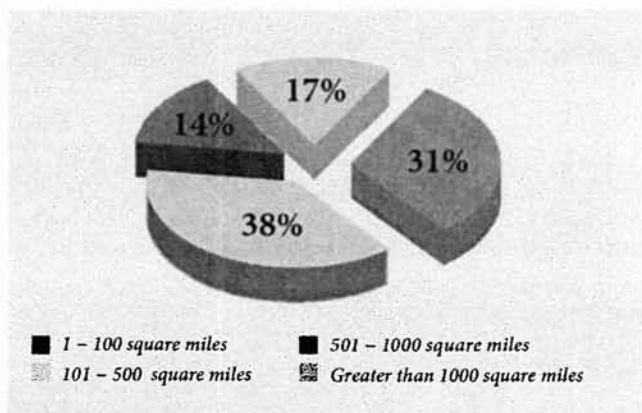
Pool members serve small populations over large geographic areas (see Figure 2). Covering these large areas requires extensive cable and wire facilities, additional transmission equipment and innovative technologies, driving up the cost per subscriber to deliver voice and high-speed broadband services such as DSL to rural customers.

Most TS pool member service areas do not enjoy the economies of scale afforded their large, non-rural counterparts who operate in urban areas and serve many thousands of access lines per square mile (see Figure 3).

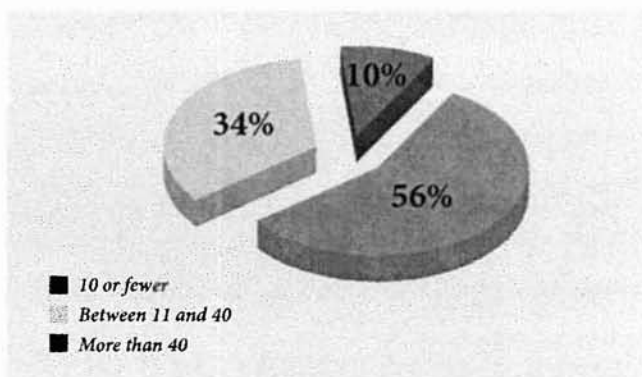
Customer bases are extremely small, averaging only 4,324 access lines per company (see Figure 4). In addition to the data shown in Figure 4, 28 percent or 312 companies have fewer than 1,000 access lines.

### Competition in rural America

TS pool members experienced a loss of 196,564 access lines, a 4.1 percent drop over last year.<sup>1</sup> This downward trend appears to be part of an industry-wide decline in access lines attributable to competition from cable operators offering Voice over Internet Protocol (VoIP) as well as customers replacing land lines with mobile service.<sup>2</sup> More than three-



**Figure 2**  
Company Serving  
Area by Square  
Miles



**Figure 3**  
Customer Density  
per Square Mile

<sup>1</sup> Comparison of NECA Traffic Sensitive pool data for 2008 and 2009.

<sup>2</sup> FCC Industry Analysis and Technology Division Wireline Competition Bureau. *Local Telephone Competition: Status as of June 30, 2008 (July 2009)*.

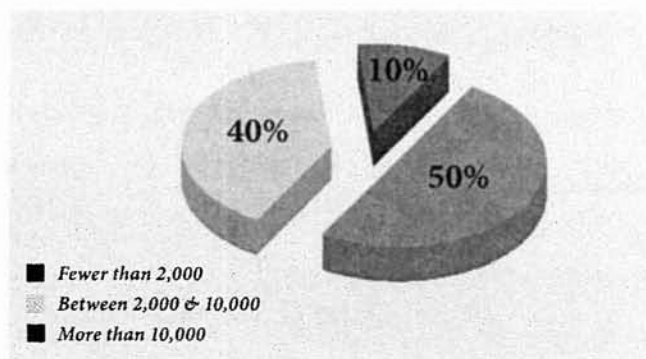
fourths of TS pool members report some competition in their service area. Typically, this competition is concentrated in the more densely populated portions of rural service areas. TS pool members report competition for services as shown in Table 1.

**Table 1 – TS Pool Competition**

<b>Pool members report competition in 2009 for:</b>	<b>No. of companies</b>	<b>% of companies</b>
Voice services (including VoIP and cellular providers) . . . . .	824	75%
Video services . . . . .	498	45%
Satellite services . . . . .	746	68%
Broadband data services (from cable modem) . . . . .	495	45%
Broadband data services (from wireless broadband) . . . . .	538	49%

#### **Rural carriers meet customers' needs despite challenges**

As these statistics show, pool members serve small customer bases spread over vast geographical areas, requiring more resources than their larger counterparts. Pool members continue to meet the challenges, improving their networks to provide the high-quality voice and broadband services their customers demand. The following pages will show how members are deploying the latest technologies in their networks.



**Figure 4**  
**Companies by**  
**Line Size**

Virtually all TS pool members (97 percent) offer DSL services (see data chart on page 18) <sup>5</sup>. The average broadband availability for these companies in 2009 is 92 percent. In contrast, the 2005 average broadband availability was 79 percent. Rural companies often provide broadband services using multiple technologies: DSL, cable modem through a cable affiliate, and wireless. While 92 percent broadband availability shows continued progress, challenges persist. This is evidenced by the low overall average take rate of 31 percent. Contributing factors limiting broadband take rates in rural markets include:

- The high cost of last and second mile networks
- Limited access to affordable middle mile transport
- Lack of access to affordable video content

#### **Fiber to the home aids broadband take rates**

In addition to DSL, TS pool members are deploying fiber technology in their networks (see Table 2). This technology enables high speed broadband transmission over a fiber optic link between an optical terminal and the end user or a node close to the end user. Fiber loops allow two-way transmission bandwidths in the range of 10 to 100 Mbps to each end user, while supporting simultaneous voice, data and video services - the triple play.

Some companies view deploying fiber loops as a way to increase broadband take rates and to 'future proof' their access networks, since they know future bandwidth requirements will increase to meet new service needs. Fiber loops can also go greater distances at a lower overall cost than copper loops. While the distance limit without a need to add electrical devices is 18,000 feet for copper, it's up to 12 miles for fiber, making the fiber technology ideal for rural markets. Telephone companies deploying fiber loops have reported new installation costs for fiber equivalent to copper, however overall maintenance costs for fiber loops are lower. <sup>6</sup>

**Table 2 – TS pool Members Fiber Loop Deployment Progress**

<b>Fiber Deployment*</b>	<b>2009</b>	<b>2008</b>	<b>% change</b>
No. of members deploying fiber loops in their networks . . . . .	479	429	12%
FTTP/FTTH loops installed in networks . . . . .	183,000	152,000	20%

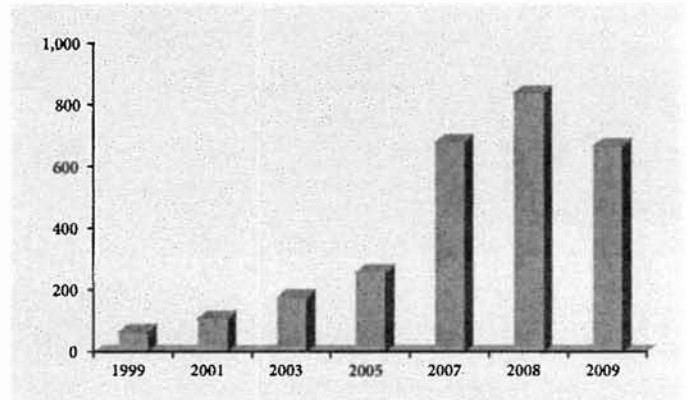
\* (See Fiber to the Home definition in the glossary for acronym meanings.)

<sup>5</sup> The 1,066 TS pool members that offer DSL services include companies who do not participate in NECA's F.C.C. Tariff No. 5 for DSL services and offer DSL on a de-tariffed common carriage basis.

<sup>6</sup> M.K. Weldon and R.A. Metallo, *Ready, Aim, FIBER! Targeting FTTP for Last Mile Access*, (Lucent Technologies) (2004).

### ATM helps rural telephone companies provide advanced communications

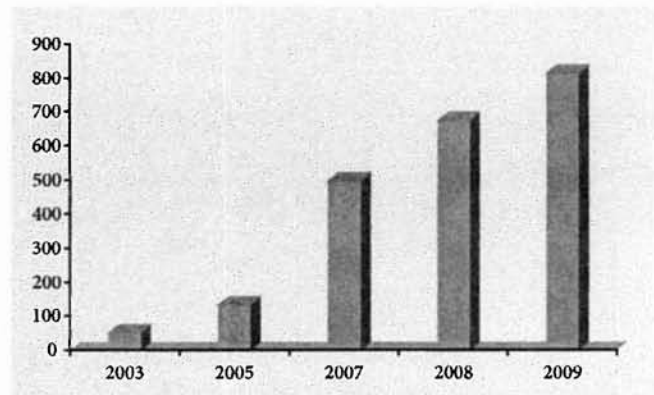
Asynchronous Transfer Mode (ATM) is a high-performance packet switching and multiplexing technology integrating voice, data, and video services. ATM technology is widely deployed in both public and private networks and has been the leading technology for integrating DSL services within the local exchange. ATM is an important advanced services technology deployed for DSL traffic aggregation by almost two-thirds of TS pool members (see Figure 6). However, companies are starting to replace ATM equipment with Ethernet equipment. In 2008, 278 companies or 25 percent offered ATM services while in 2009, 199 or 18 percent offer ATM services.



**Figure 6**  
ATM Growth  
1999-2009

### IP and Ethernet improve connectivity and pave the way for higher speeds

Ethernet is a widely deployed, low cost packet technology that can be used to integrate voice, data, and video services. It is experiencing strong growth in both large service areas as well as smaller rural markets. Ethernet provides an alternative transmission technology for low-cost, high-speed broadband access to rural health care, education, government offices and small business customers. Ethernet is also used to provide DSL traffic aggregation and IP backhaul. IP routing using Ethernet transmission is becoming a strong technology alternative likely to replace much of the current legacy network over time. For 2009, 74 percent of pool members have deployed Ethernet technology in their networks (see Figure 7). NECA's Ethernet Transport Service (ETS) allows members to offer customers high speed (10 Mbps to 1 Gbps) broadband access service. This year 27 percent of TS pool members are offering ETS, an increase of 10 percent over 2008. Members report when Ethernet is available in the Middle Mile, costs are lower and bandwidths are higher.<sup>7</sup>



**Figure 7**  
Ethernet Growth  
2003-2009

<sup>7</sup> National Exchange Carrier Association's Comments on NSP Public Notice # 11 (November 4, 2009)

### Wireless access technologies

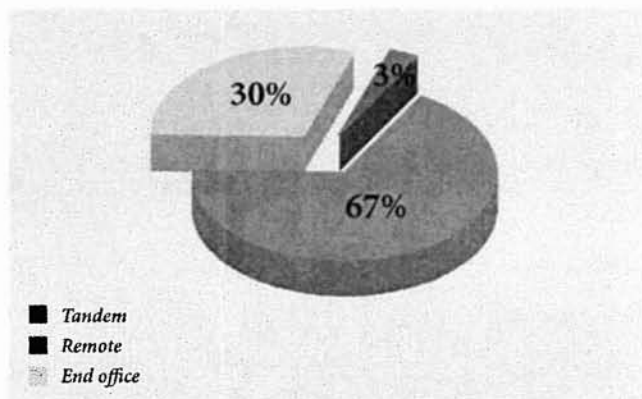
TS pool members are increasingly using wireless-based services to provide exchange access and broadband services. A number of companies have implemented new licensed and unlicensed wireless technology to replace outdated legacy fixed Basic Exchange Telephone Radio Services (BETRS) and Rural Radio Services, which traditionally have been used to provide local exchange service in particularly inaccessible areas. Recent data from TS pooling members demonstrates the affiliates' use of mobile wireless capabilities and deployment of broadband wireless services to supplement fixed landline facilities, *i.e.*, DSL and fiber. Table 3 summarizes rural wireless access availability.

**Table 3 – Rural Wireless Access**

Rural Wireless Access	No. of companies
Provide fixed wireless loops in own study areas .....	65
Wireless broadband in own study areas .....	166
Wireless broadband outside own study areas .....	214
Mobile services (e.g., cellular) .....	309

### Switching Technologies

Two-thirds of the companies in the TS pool use remote voice switches with connections to larger network concentration points such as host switches (see Figure 8). Remote switches are a cost-efficient method of serving geographically dispersed subscribers. TS pool members have installed 6,053 switching systems to handle voice communications in support of their business and residential customers, an average of 787 lines per switch. The average company has nearly six switches. These averages have varied little in the past 17 years.



**Figure 8**  
Switching  
Systems in  
Rural Areas

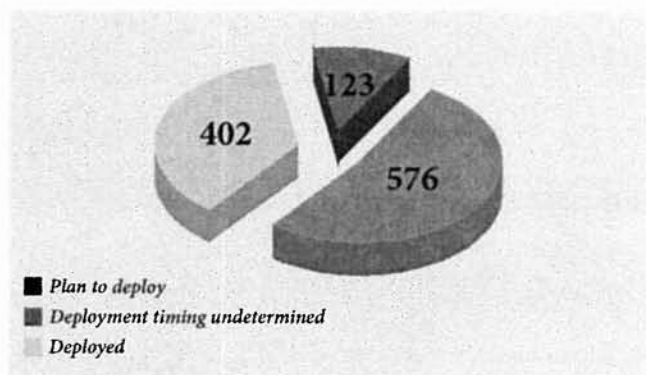
Rural telephone companies are upgrading legacy switching systems, replacing them with lower cost softswitch technology (IP enabled switches). They can also be used to provide integrated voice and broadband services to customers over a common network. Over 400 TS pool members have deployed softswitches. More than 120 pool members have plans to add a softswitch in 2010 (see Figure 9).

Most softswitches support Ethernet and IP interfaces plus legacy GR-303, ISDN PRI, SS7 and channelized T1 interfaces, making the technology ideal for the migration of rural networks from circuit to packet switching. Softswitch vendors have options for rural incumbent companies to consider, from completely replacing their switched network with packet devices to using a more seamless migration approach allowing selective replacement of legacy switches. The latter involves configuring the local network to support the packet network interfaces while maintaining the integrity of existing legacy switch network devices over a common IP enabled network platform.

Migration from the legacy switch environment to packet switching requires an initial replacement of core devices such as the central processor and switch fabric of the legacy network switch, while leaving all the line units and other peripherals in place. Over time, as subscribers are transferred from legacy circuit switch peripherals to the new softswitch, legacy peripherals may be retired. In most cases, the transition is transparent to the end user. A soft-switch typically supports legacy services and features including POTS, ISDN, Centrex, LNP, and CALEA, and it allows for the integration of broadband Internet, wireless, and wireline network transport over a common IP enabled network platform.

#### **Affiliated operations: wireless, video, and data**

In addition to traditional regulated operations, TS pool members use affiliates to provide non-regulated information, entertainment and mobile radio services to their end user customers. The same low density market issues with telephone operations make most rural markets unattractive to larger information and entertainment service providers. This often means the small rural telephone company and its affiliates are the sole or main provider of these services to their customers.



**Figure 9**  
**Softswitch**  
**Deployment**  
**by TS Pool**  
**Members**



### Wireless expansion in rural networks

Three NECA members participated in the FCC Wireless Auction of Broadband radio Service (BRS) Spectrum (Auction 86) in 2009. Two members were successful, provisionally winning four licenses. Previously, more than 500 companies, through affiliates, consortiums and partnerships, bid for spectrum in the FCC Auctions 73 and 78 in 2008. Winning bids went to 295 companies to serve customers located in their rural geographic serving areas. The bids represent 34 percent of the total licenses the FCC awarded in these two auctions. This adds to the more than 400 companies, through affiliates and partnerships, currently holding spectrum for services in cellular, PCS, broadband radio service, and C-Band 700 MHz. See Table 4 for wireless expansion in rural networks.

**Table 4 – Rural Wireless Activity**

Wireless expansion in rural networks	No. of Companies
Pool member affiliates participating in 2009 & 2008 FCC spectrum auctions. . . . .	504+
No. of licenses awarded NECA members 2008 & 2009. . . . .	394
Affiliates offering Direct Broadcast Satellite video services and Internet Access service . . . . .	197

### Video technologies

More than 460 TS pool members are providing video services, with 210 companies also offering video services outside their study areas. IPTV is the next wave of video services delivery. Two hundred ten companies report IPTV deployment; 57 more companies plan to deploy IPTV in 2010. Companies and affiliates offering DSL with a video component or option have a DSL take rate nearly 24 percent higher than companies offering DSL without access to any video services. NECA members and affiliates are offering a variety of services over the broadband network to stimulate demand for broadband services and increase adoption. Video on demand, over-the-top video services, gaming, home networking and security are some examples of trials and experimental services.

### Information Service Provider (ISP) services

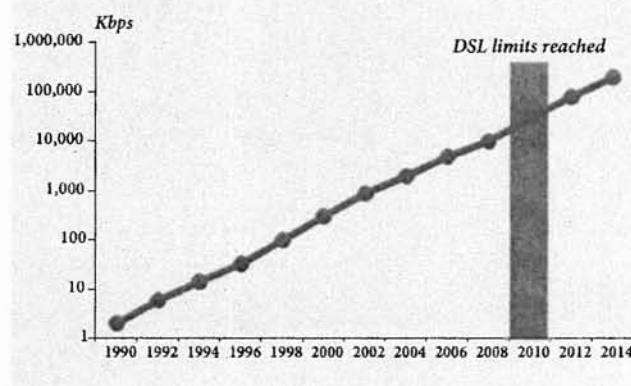
Internet information access services are provided by 757 companies within their own serving areas. In addition, 288 also provide ISP services in other serving areas. More than 180 companies provide wireless broadband data services to customers, while 225 companies provide wireline broadband through an affiliate subsidiary outside their study area.

## OUTLOOK

You've read in the preceding pages how NECA's TS pool members are providing a full range of voice and broadband services to meet their customers' needs. These companies are also looking out for their customers' future needs, designing the next generation network and planning for the additional bandwidth needed to provide advanced services.

### Bandwidth requirements are increasing

Many industry sources project a long term need for 100 Mbps per subscriber in the U.S. to accommodate new services.<sup>8</sup> The practical bandwidth limit of DSL over copper technology (currently 25 Mbps) will be reached in 2010 or soon thereafter (see Figure 10). Absent any new DSL technology breakthrough, Fiber-to-the-Home (FTTH) solutions may likely be the only foreseeable technology capable of providing future required bandwidth. Yet FTTH deployment covers less than four percent of American households. In 2009, the FTTH Council reported 5.33 million FTTH households connected in the U.S.<sup>9</sup> About two thirds of FTTH deployments are provided by the largest telephone companies and the remainder by other companies, including rural ILECs, competitive local exchange carriers (CLECs) and other providers. FTTH deployment numbers lag well behind those of other technologies, which provide broadband services to over 85 million customers. Research indicates there are over 31 million customers served by DSL, 38 million served by cable systems, and more than 16 million served by satellite and wireless technologies.<sup>10</sup>



**Figure 10**  
**Bandwidth**  
**Requirements**

<sup>8</sup> *The Future of Broadband 2008*, a seminar conducted by Light Reading.  
[http://www.lightreading.com/live/event\\_information.asp?survey\\_id=399](http://www.lightreading.com/live/event_information.asp?survey_id=399)

<sup>9</sup> FTTH Council, *FTTH Growth Stays on Track as Connections Rise to 5.33 million North American Households*, at [http://www.ftthcouncil.org/RVA\\_LLC\\_Market\\_Research\\_and\\_Consulting](http://www.ftthcouncil.org/RVA_LLC_Market_Research_and_Consulting).

<sup>10</sup> FCC Industry Analysis and Technology Division Wireline Competition Bureau. *High-Speed Services for Internet Access: Status as of June 30, 2008* (Released July 2009).



### **TS pool members deploy the next generation network**

Members continue to deploy VoIP applications as part of their next generation network. Several vendors offer a hosted VoIP application to allow rural telephone companies to “start small.” IP networks work best in a “bursty” mode, which gives file transfers and e-mail a higher probability of being successful. They do not work as well with continuous real-time data streams, such as voice and video. Because of this, quality of service (QoS) and packet traffic engineering are becoming increasingly important as the core network transitions from SONET, ATM, and TDM to Ethernet.

TS pool members continue to play a key role in providing wireline backhaul for wireless (mobile) carriers. Wireless carriers depend on the rural wireline network to provide state-of-the-art high speed data and packet networks to interconnect cell sites to mobile switching centers.

This report shows that TS pool members continue to make strong progress evolving their joint use networks to provide the services their customers want today, and also to meet the communication needs of tomorrow over a common IP enabled broadband network platform. In doing so, rural carriers face significant challenges serving customers in high-cost, low-density markets. Rural carriers also face significant issues with the high cost of middle mile transport, a critical component of broadband Internet connectivity.

## ABOUT NECA

NECA is a not-for-profit association of all incumbent telephone local exchange carriers. We have administered the Federal Communications Commission's interstate access charge plan for more than twenty-five years. Interstate access charges are the fees paid by other telecommunications providers to local telephone companies for the use of their networks to originate and terminate interstate calls. In addition, we provide pooling and tariff support to assist local telephone companies as they offer broadband and other special access services, including wireline backhaul for the wireless industry. Our areas of expertise include telecommunications, data collection, research and analysis, and training in technology and access-related topics. We administer the revenue distribution process called pooling, which is at the heart of the rural telephone economic system.

NECA files one interstate access tariff (Tariff F.C.C. No. 5) on behalf of all pool members, minimizing the regulatory expenses associated with developing and filing a tariff and freeing members to focus on serving their customers. Pooling acts as an insurance policy against unforeseen circumstances such as a natural disaster. Pooling offers financial stability, allowing pool members to be more confident when making plans for future network deployment. Participation in two revenue pools – Common Line and Traffic Sensitive – is voluntary.

### Contact us:

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Tel. 800.228.8597

**Government Relations** – Washington, D.C.  
Tel. 800.382.0327

### Regional offices

Eastern – Whippany, New Jersey  
Tel. 800.228.8398

Midwestern – Chicago, Illinois  
Tel. 800.323.4953

North Central – Omaha, Nebraska  
Tel. 800.228.0180

Southern – Alpharetta, Georgia  
Tel. 800.223.7751

Southwestern – St. Louis, Missouri  
Tel. 800.351.9033

Western – Greenwood Village, Colorado  
Tel. 800.892.3322

**Equal Access** – Provides customers with a choice of long distance carrier.

**Ethernet** – A local area network technology that connects computers, printers, servers, etc., in a physical location. Carrier ethernet equipment provides reliable ethernet connectivity beyond the LAN through the telecommunications network. Ethernet uses twisted pair (copper), fiber optic, and coaxial cable and may also use wireless connectivity or transport.

**Fiber to the Home (FTTH)** – A technology which uses a high speed fiber connection to the home or business for transport of voice, data, and video services. Variations include Fiber to the Building (FTTB), Fiber to the Curb (FTTC), Fiber to the Node (FTTN), and Fiber to the Premises (FTTP). The primary difference between the systems depends on the location of the remote optical network unit.

**GR-303 Integrated Digital Loop Carrier System Generic Requirements (Telcordia Technologies)** – An industry standard for the interface between a local digital switch and a remote digital terminal (or DLC). Each GR-303 interface group consists of at least two DS1 lines and can contain up to a maximum of 28 DS1 lines. The primary line carries the embedded operations channel (EOC) and timeslot management channel (TMC), and the secondary line offers protection in case of loss of service on the primary line.

**Incumbent Local Exchange Carrier (ILEC)** – A local exchange carrier that on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in a specific area and was deemed to be a member (or successor to a member) of NECA pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)).

**Integrated Services Digital Network (ISDN)** – A digital telephone system which has been available since the 1980s. ISDN involves the digitization of the telephone network, which permits voice, data, text, graphics, music, video, and other source material to be transmitted simultaneously over existing telephone facilities.

**Internet Protocol (IP)** – The method by which packet data is sent from one computer to another. Every server, router, and switch in an IP network is uniquely identified by at least one IP address.

**Internet Protocol Television (IPTV)** – A system for delivering digital television service to subscribers via a broadband connection using the Internet Protocol suite. IPTV often includes Video on Demand (VoD) and Personal Video Recording (PVR) services. It also may be combined with Internet access and voice services, and is often called Triple Play. Triple Play is typically provided by a broadband operator using a single converged infrastructure.

**Local Area Network (LAN)** – A computer network covering a limited geographic area, typically a single building. Most LANs are based on switched Ethernet technology running at 10, 100, or 1,000 Mbps (1 Gbps). A local area network may serve as few as two or three users (in a small business or home network) or thousands of users.

**Personal Communication Services (PCS)** – Used to describe a newer class of wireless communications services recently authorized by the FCC. PCS systems use a different radio frequency, the 1.9 GHz band, than cellular phones and generally use all-digital technology for transmission and reception. (Definition from the Wireless Advisor glossary.)

**Primary Rate Interface (PRI)** – An international telecommunications standard for carrying multiple DS0 (64 Kbps) voice and data channels between two physical locations. A single Primary Rate Interface consists of 23 64 Kbps B-channels and one 64 Kbps D-channel using a T1 line (1.544 Mbps). Additional PRIs may be added to a PRI group, each with 24 B-channels.

**Public Switched Telephone Network (PSTN)** – The local, long distance and international phone system used daily.

**Softswitch** – A generic name for a next generation network infrastructure based on packet switching. Softswitch technology solutions enable all types of packet protocols (VoIP, data or video) to be served on a single software-controlled packet switching platform. Softswitch technology separates the call control functions of a telephone, data or video “call” from the transport function that carries the call. The call control functions will generally include call routing, admission control, connection control and signaling internetworking (e.g., converting SS7 signaling to SIP packet protocol). The Softswitch functions can be in discrete network devices or integrated into a single network device. While the softswitch was initially developed to replace the legacy voice switch, the softswitch now also includes packet data routing functionality and can serve as the core of a broadband network.

**Synchronous Optical Network (SONET)** – An industry standard technology capable of transmitting multiple digital signals of varying capacities on fiber optic facilities. Ideally, SONET facilities are configured in a physical ring for redundancy and recovery purposes.

**Time-Division Multiplexing (TDM)** – A technique for transmitting multiple digitally encoded data, voice, and/or video signals simultaneously over a single communications medium by interleaving a portion of each signal one after another in specific time slots.

**Traffic Sensitive (TS) Pool** – The pool that NECA administers for the portion of the network where costs vary according to usage. Pool members apply the TS tariff rate elements: Traffic Sensitive – Switched and Traffic Sensitive – Special Access, including DSL and other broadband services.

**User Generated Content (UGC)** – Various kinds of publicly available media content produced by end users.

**Voice over Internet Protocol (VoIP)** – A technology that allows users to make telephone calls using a broadband Internet connection instead of a regular (or analog) phone line.

**Wireless Fidelity (WiFi)** – A Wireless Local Area Network specified by the Institute of Electronic and Electrical Engineers (IEEE) as 802.11b.

**Worldwide Interoperability for Microwave Access (WiMAX)** – WiMAX is a standards-based (IEEE 802.16) technology which may be used in the delivery of last mile wireless broadband, as an alternative to cable and DSL.

DATA TABLE

TS POOL MEMBERS – 2009 VIEW

Demographics						Broadband Capabilities								
Jurisdiction	Companies	Switches	Access Lines	Provide Equal Access	Provide S87	Provide DSL Service	DSL Access Lines	Provide ATM Service	Deploy ATM in Network	Provide Ethernet Service <sup>†</sup>	Deploy Ethernet in Network	Provide SONET Service <sup>†</sup>	Deploy SONET in Network	Provide Other Broadband Technologies <sup>††</sup>
Alabama	21	80	102,381	100%	100%	100%	26,319	19%	29%	29%	62%	0%	62%	100%
Alaska	19	89	111,310	79%	84%	74%	36,836	21%	37%	37%	68%	21%	32%	68%
American Samoa	1	4	10,297	100%	100%	100%	*	*	*	*	*	*	*	*
Arizona	12	44	37,291	100%	100%	100%	8,621	25%	75%	33%	75%	17%	92%	75%
Arkansas	19	115	73,661	100%	100%	95%	25,568	11%	58%	21%	63%	16%	68%	63%
California	13	19	67,026	100%	100%	100%	27,011	31%	85%	85%	85%	8%	85%	62%
Colorado	24	37	34,453	98%	96%	88%	9,545	13%	58%	17%	63%	8%	42%	75%
Florida	6	12	65,667	100%	100%	100%	18,351	17%	83%	67%	83%	17%	100%	100%
Georgia	26	60	179,277	97%	100%	100%	55,199	8%	65%	27%	65%	0%	81%	100%
Guam	1	3	52,884	100%	100%	100%	*	*	*	*	*	*	*	*
Hawaii	1	9	1,889	100%	100%	100%	*	*	*	*	*	*	*	*
Idaho	13	50	32,103	100%	100%	100%	12,729	31%	92%	38%	100%	15%	92%	85%
Illinois	38	119	56,681	97%	92%	97%	18,941	13%	39%	6%	55%	0%	42%	63%
Indiana	33	74	101,206	100%	100%	100%	39,733	27%	70%	33%	76%	0%	70%	94%
Iowa	144	314	187,534	100%	100%	97%	69,170	1%	37%	9%	72%	1%	56%	64%
Kansas	34	114	113,342	100%	100%	97%	48,547	18%	53%	38%	76%	12%	79%	97%
Kentucky	12	279	119,366	100%	100%	100%	37,702	42%	75%	50%	83%	0%	92%	100%
Louisiana	9	62	35,589	100%	100%	89%	12,475	0%	56%	56%	44%	0%	67%	89%
Maine	19	116	114,329	100%	100%	100%	33,924	26%	84%	42%	63%	26%	89%	47%
Maryland	1	1	6,350	100%	100%	100%	*	*	*	*	*	*	*	*
Massachusetts	2	2	3,473	100%	100%	100%	774	0%	50%	50%	50%	0%	0%	50%
Michigan	31	99	77,893	100%	100%	97%	24,785	16%	58%	39%	81%	3%	58%	77%
Minnesota	80	298	287,831	100%	98%	94%	83,341	18%	60%	14%	74%	9%	61%	61%
Mississippi	16	48	47,962	100%	100%	100%	14,302	44%	63%	19%	81%	0%	56%	81%
Missouri	36	155	106,615	100%	100%	100%	38,956	8%	58%	31%	67%	0%	69%	75%
Montana	14	187	90,171	100%	100%	100%	31,883	21%	79%	7%	86%	29%	93%	86%
Nebraska	35	140	62,963	100%	100%	97%	24,997	0%	57%	9%	63%	9%	69%	86%
Nevada	8	29	30,358	100%	100%	100%	12,806	38%	88%	13%	100%	25%	88%	50%
New Hampshire	9	32	48,369	100%	100%	100%	13,759	44%	78%	67%	67%	0%	78%	89%
New Jersey	1	2	6,738	100%	100%	100%	*	*	*	*	*	*	*	*
New Mexico	12	74	36,469	100%	100%	100%	9,976	8%	58%	25%	67%	8%	75%	92%
New York	31	85	137,731	100%	97%	100%	41,439	19%	71%	29%	84%	0%	81%	94%
North Carolina	14	140	181,470	100%	100%	100%	38,790	57%	100%	64%	100%	21%	100%	93%
North Dakota	20	260	135,253	100%	100%	100%	52,685	40%	90%	50%	85%	25%	95%	100%
Ohio	33	25	62,668	100%	88%	94%	15,066	9%	64%	18%	73%	0%	64%	64%
Oklahoma	34	264	158,232	100%	100%	94%	63,432	24%	59%	24%	74%	6%	79%	82%
Oregon	27	58	69,290	100%	100%	93%	27,905	11%	70%	33%	81%	0%	63%	85%
Pennsylvania	23	729	471,377	100%	100%	96%	91,863	17%	70%	17%	83%	17%	83%	78%
South Carolina	12	186	93,847	100%	100%	100%	31,466	50%	92%	33%	75%	17%	75%	75%
South Dakota	28	180	115,836	100%	93%	93%	40,745	11%	64%	11%	71%	18%	93%	79%
Tennessee	16	531	212,478	100%	100%	100%	72,138	50%	81%	50%	94%	0%	75%	88%
Texas	43	352	218,809	100%	100%	100%	69,857	21%	65%	21%	65%	12%	77%	86%
Utah	11	70	66,550	100%	100%	100%	27,074	9%	64%	55%	91%	9%	55%	91%
Vermont	9	39	59,697	100%	100%	100%	25,152	44%	89%	44%	44%	33%	67%	100%
Virginia	15	181	75,125	100%	100%	93%	26,504	20%	67%	33%	80%	7%	60%	93%
Washington	20	54	72,621	100%	100%	90%	26,619	25%	55%	35%	70%	5%	40%	70%
West Virginia	6	6	16,048	100%	100%	100%	5,203	0%	0%	17%	67%	33%	67%	83%
Wisconsin	64	204	290,103	100%	100%	100%	64,021	23%	73%	39%	89%	3%	78%	88%
Wyoming	5	23	22,410	100%	100%	100%	8,904	40%	60%	20%	80%	40%	80%	80%
	1,101	6,054	4,761,023	99%	99%	97%	1,477,876	18%	61%	27%	74%	7%	69%	78%

\* Individual data withheld to maintain company confidentiality. All data included in totals.

† TS pooling companies offering ATM, Ethernet and SONET services to their customers and are listed in NECA's Tariff F.C.C. Wire Center Tariff # 4.

†† Includes fiber such as FTTP, FTTH, FTTC or Hybrid-Fiber-Coax; wireless broadband technologies using fixed wireless, licensed wireless, unlicensed wireless, WiFi or WiMAX; cable modem and satellite.

**For further information about NECA, visit our website at [www.neca.org](http://www.neca.org) or contact:**

**Director – Corporate Communications**

**NECA**

**80 South Jefferson Road, Whippany, NJ 07981**

**Tel: 800.228.8597, x8207 Fax: 973.884.8372**

# MAPS



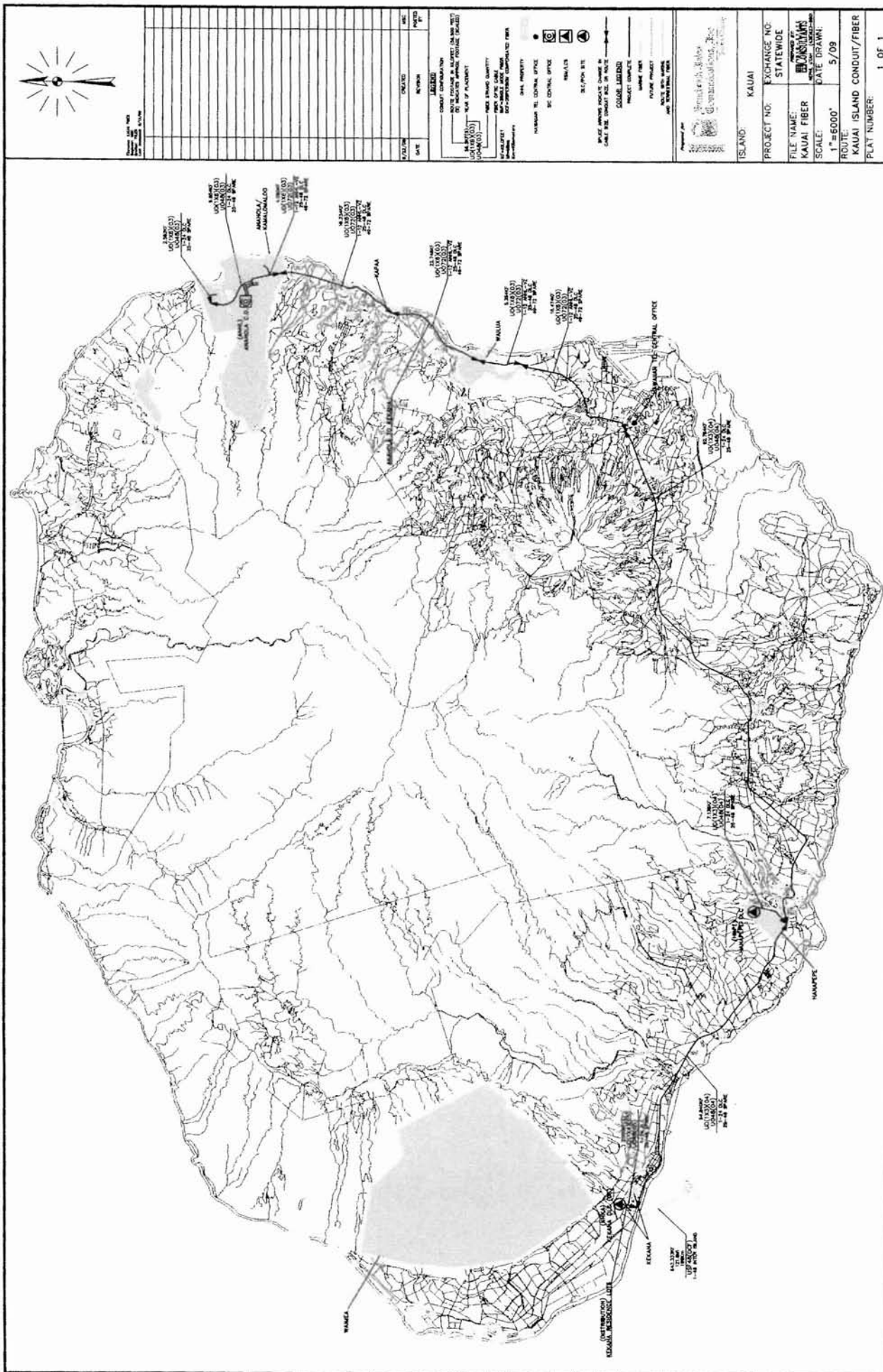
**TAX MAP KEY PLATS  
OBTAINED ON THE SPOT.**

**Sanctus Mors  
Communications, Inc.**

FILE NAME:	MAN-00000000	SHEET NUMBER:	1 OF 1
SCALE:	RTS	DATE DRAWN:	
REVISION AREA:	ALL	EXCHANGE:	ALL









[illegible]

\_\_\_\_ CONCRETE COMPOSITION

\_\_\_\_ INQUIRY FOOTING IN PROJECT (SHEEDED FEET)  
(X) INDICATES APPROX. FOOTING (SCALE)

\_\_\_\_ YEAR OF PLACEMENT

QJ(1X8)(Q3) -O46(Q3)	_____ PAPER STRAND QUANTITY _____ PAPER OF THE CABLE _____ BARE-INSULATED WIRE PAPER _____ JOINT-COMPONENT COMPANIONED PAPER
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DATA PROPERTY HARMAN TEL. CENTRAL OFFICE

SEC. 101. (a) The Secretary shall submit to the President a report on the progress of the program under this title for each year.




SPACE ABOVE INDICATE CHANGE IN  
CABLE SIZE, COMBAT SIZE, OR ROUTE

COLOR METHOD \_\_\_\_\_  
PROJECT CODE \_\_\_\_\_

Working Party  
Working Party 21

NAME: XXXXXXXXXX  
 ADDRESS: XXXXXXXXXX  
 CITY: XXXXXXXXXX  
 STATE: XXXXXXXXXX  
 ZIP: XXXXXXXXXX

Received 2007-01-10

**University of Virginia**  
College of Arts and Sciences  
Department of English  
P.O. Box 8003  
Charlottesville, VA 22904-8003  
Tel: 800-924-6463  
Fax: 800-924-6463  
E-mail: [english@virginia.edu](mailto:english@virginia.edu)

ISLAND: \_\_\_\_\_

PROJECT NO:	EXCHANGE NO:
OAHU (KAPOLEI AREA)	

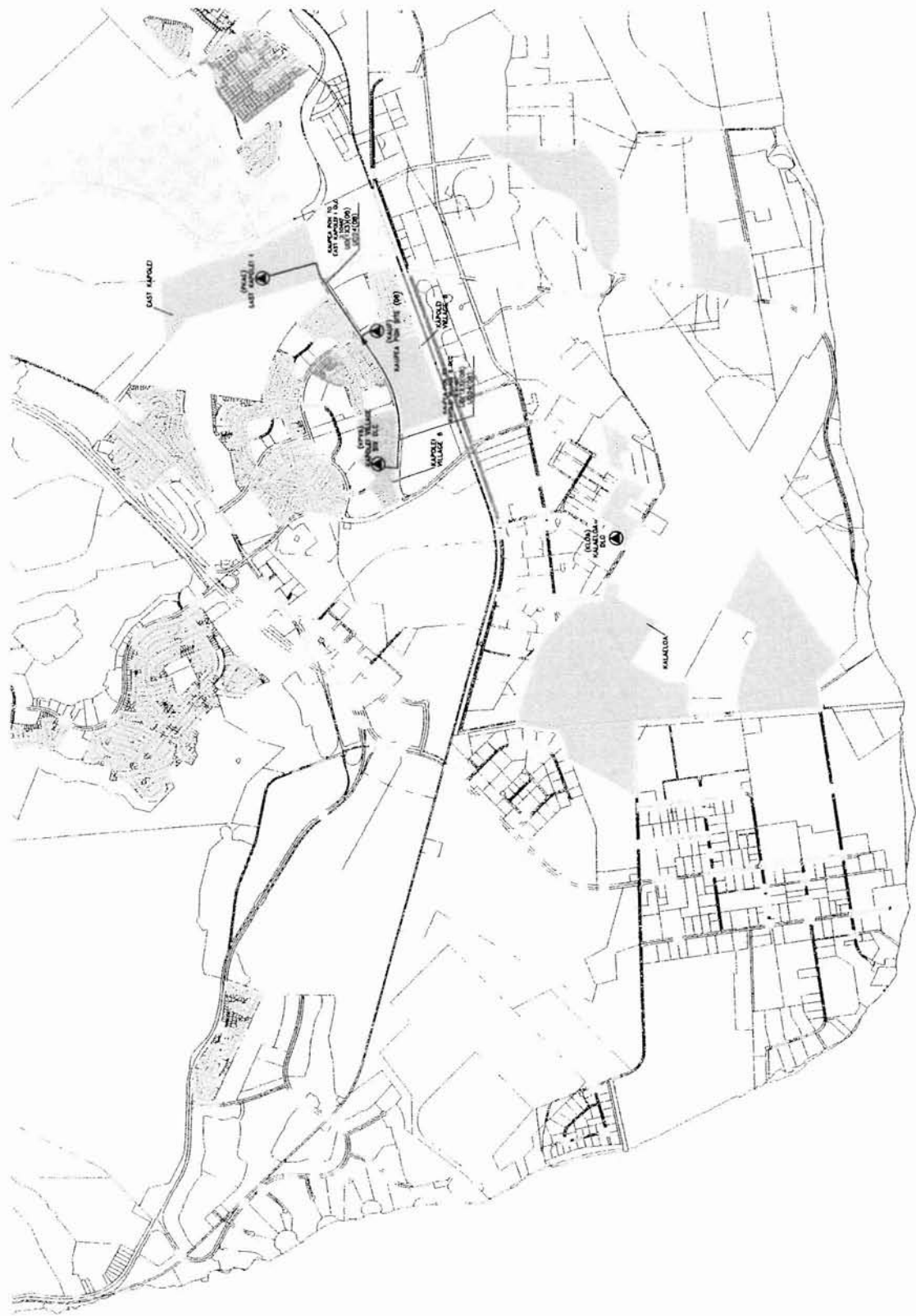
FILE NAME:	STATEWIDE
	APPROVED BY SCHOOL DISTRICT

KAPOLEI DETAIL	EEB CONSULTANTS ENGINEERING (408) 861-1100
SCALE:	DATE DRAWN:

1"=1100'	10/04
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KAPOLEI AREA DETAIL

2 OF 2



Approved: \_\_\_\_\_

Compendio de la obra

SLAND:  
OAHU (KAPOLEI AREA)

PROJECT NO:	EXCHANGE NO:
	STATEWIDE

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KAPOLEI DETAIL	

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1" = 100'	10/04

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KAROLEI AREA DETAIL		

PLAT NUMBER:

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\_\_\_\_ CONSULT CONFIGURATION

\_\_\_\_ ROUTE FOOTAGE IN REPORT (SAL 800 FEET)  
(S) INDICATES APPROX. FOOTAGE (MILES)

\_\_\_\_ YEARS OF PLACEMENT

SAL 800 FEET

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NABARMAN W. GENERAL OFFICE

[illegible]

DLG/ANON 517E  
RPM/A 675

PRICES APPROXIMATE INDICATE CHANGES IN  
CABLE SIZE, COMBAT SIZE, OR ROUTE

PROJECT COMPLETE

NOVEMBER 1970

Product	Product
Product	Product

OFFICE OF THE ATTORNEY GENERAL  
STATE OF NEW YORK


**Author's Address:** Department of Psychology, University of Illinois at Chicago, 4400 S. Maryland Ave., Chicago, IL 60607, USA. E-mail: [shawn@uic.edu](mailto:shawn@uic.edu)


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SLAND;	NOLOKAI
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	REVISED BY MCCALL, J. L. 1/1/11

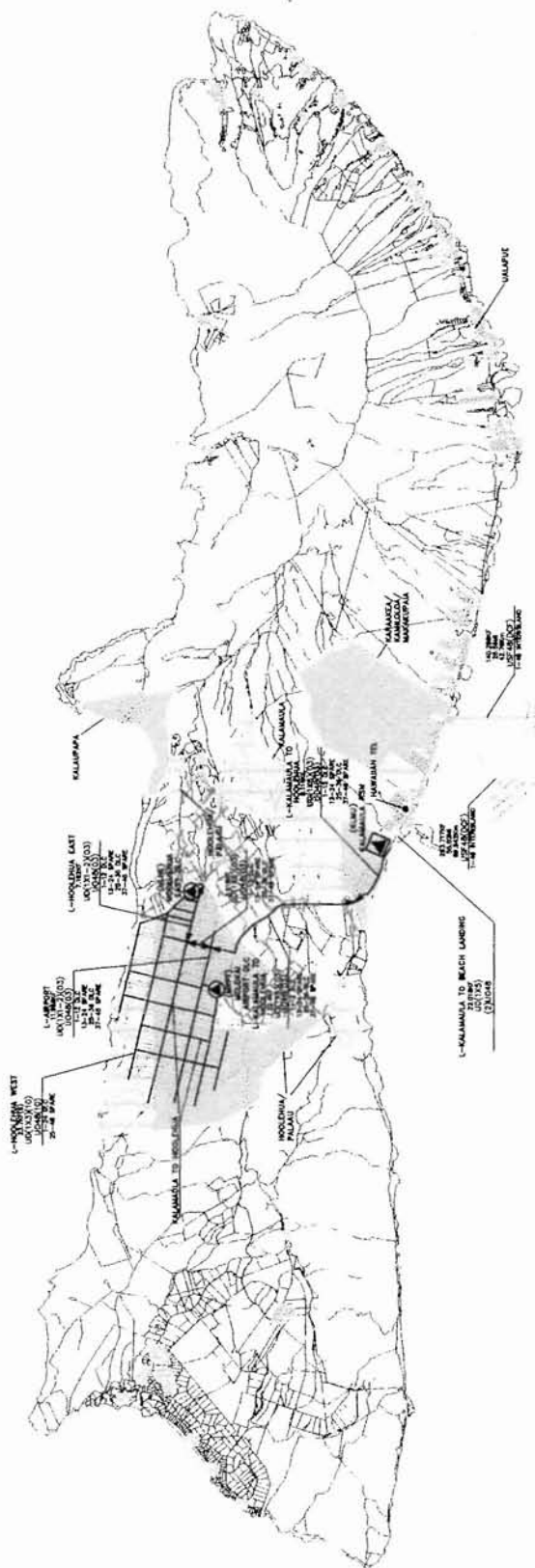
MOLOKAI FIBER	 <b>ENVIRONMENTAL CONSULTANTS, INC.</b> 1000 N. W. 10th St. (407) 531-1100
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MOLOKAI ISLAND CONDUIT/FIBER

1 OF 1

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Required for

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1008

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PROJECT

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ROUTE:

**PLOKAI**

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 2. LAST NAME  
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 4. MIDDLE NAME  
 5. DATE OF BIRTH  
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 7. GRADE  
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 9. ADDRESS  
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 14. E-MAIL ADDRESS  
 15. SIGNATURE  
 16. DATE

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BLAND:	MAUI	EXCHANGE NO:	STATEWIDE	REMOVED BY BIOLOGICALS SPECIAL AGENT DATE DRAWN: 6/04
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PLAT NUMBER:				







[illegible]

POSITIVE FOOTINGS IN RELIEFS (34,300 FEET)  
(18) INDICATES APPROX. POSITION (SCALE)  
YEAR OF PLACEMENT

PO 1185 (03)  
 PO 406 (03)

FROM STAGE QUANTITY  
 FROM OFFICE CABLE  
 NEW-SCALE MOOD FROM  
 OFF-ANALOGY COMPLICATED FROM

27-03-03  
 11/03/03

0-800-967-7624

MC CENTRAL OFFICE  
TEL. CENTRAL OFFICE  
MC CENTRAL OFFICE

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SPACE ARROWS INDICATE CHANGE IN  
CABLE SIZE. CONCENT RAIL ON RIGHT

[illegible]

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ISLAND: HAWAII (HILO AREA)

PROJECT NO:	EXCHANGE NO:
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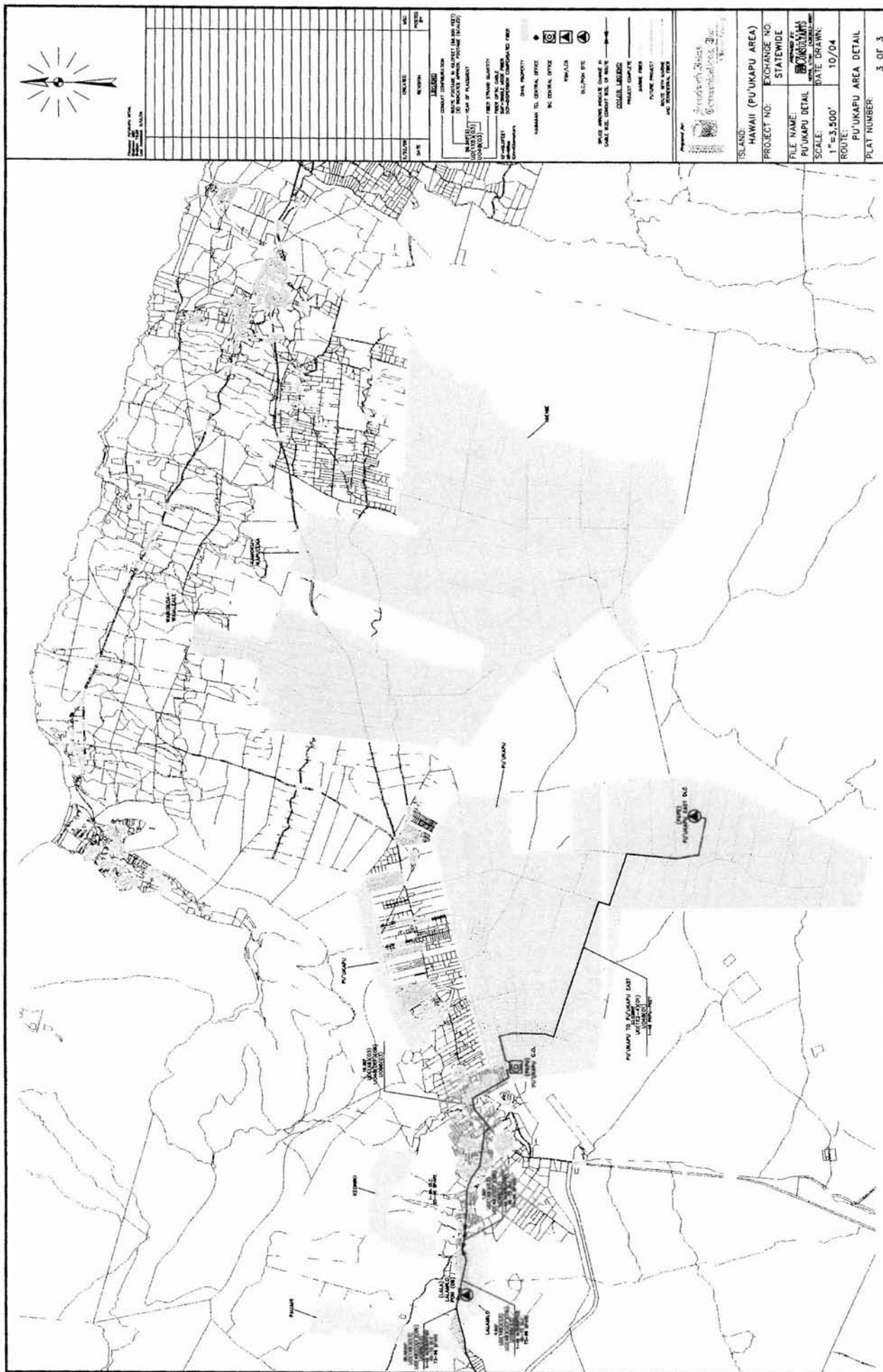
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DATE DRAWN: 4/04

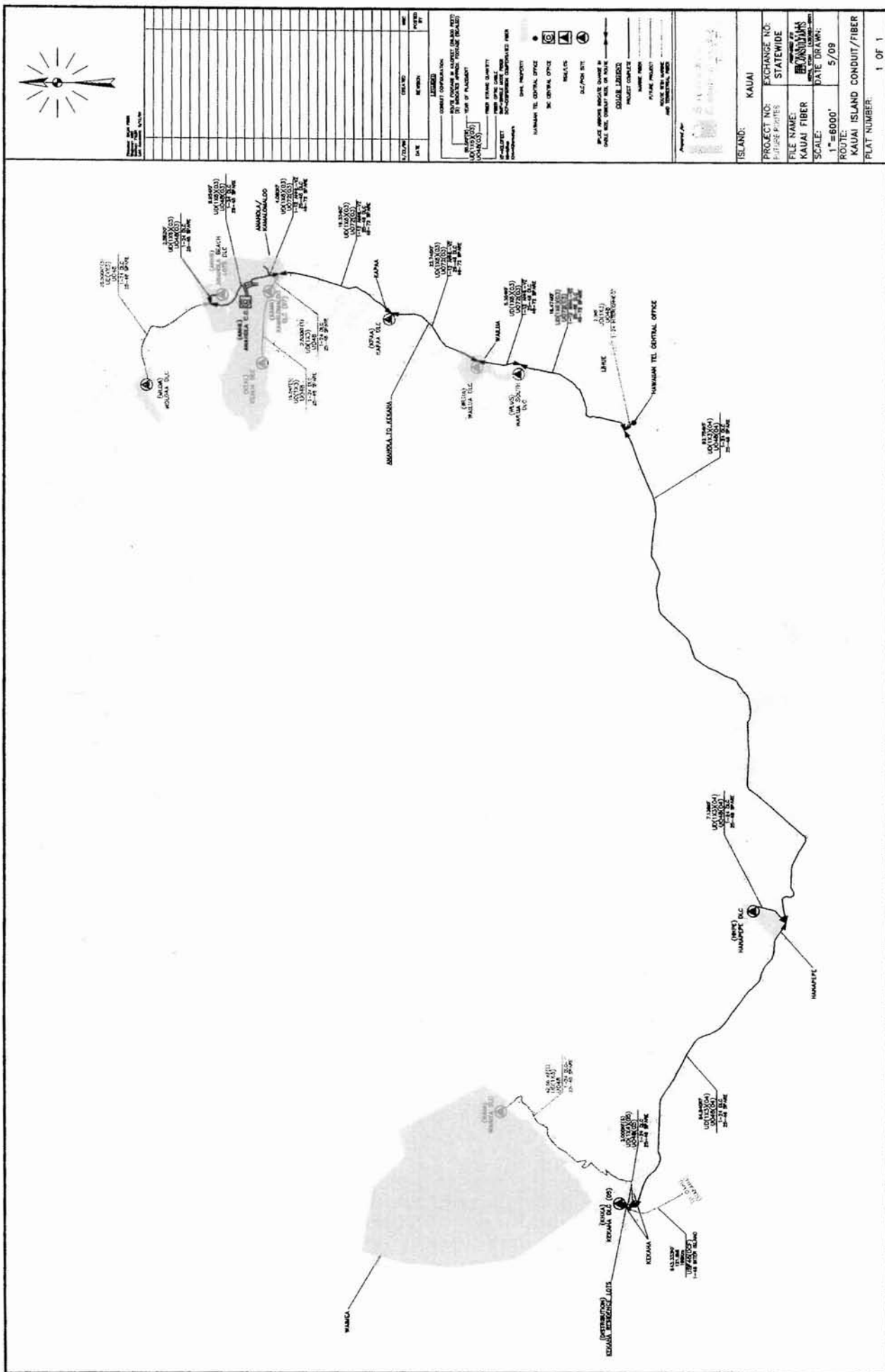
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HILO AREA CONDUIT/FIBER	

PLAT NUMBER: 2 OF 3













[illegible]

DATE	OFFICER	POSITION	REMARKS

CONSENT CONTINUATION

\_\_\_\_\_  
RESIDE FOOTAGE IN SUBJECT (MAGNETIC TAPE)  
(TO INDICATE APPROX FOOTAGE AVAILABLE)

DATE [ ] / [ ] / [ ] YEAR OF PLACEMENT

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2048 PROPERTY  
NABHARAN TEL. CENTRAL OFFICE


  
 SAC CENTRAL OFFICE  
 RM/A, 29

SLC/MON SITE

SPRUE APPLICANTS REQUEST CHANGE IN  
CABLE SIZE, CONDUIT SIZE, OR ROUTE



COLOR: \_\_\_\_\_  
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 NAME: \_\_\_\_\_

**FUTURE PROJECTS** — **ROUTE 131 IMPROVEMENT AND STRUCTURAL PIERCE**

1997

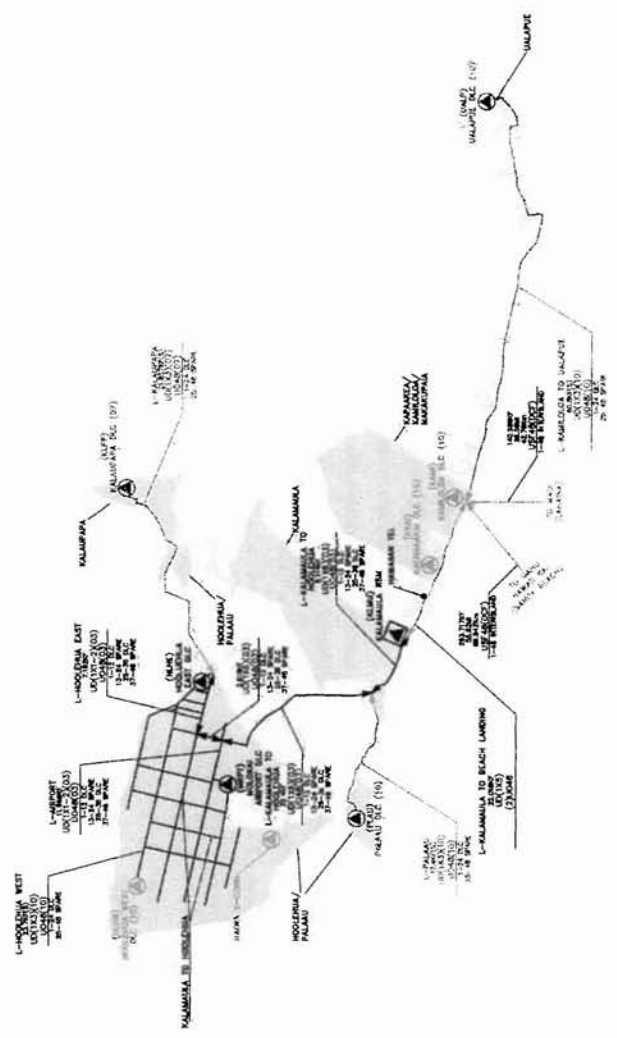
ISLAND:	MOI OKAI
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PROJECT NO: THREE ROUTES	EXCHANGE NO: STATEWIDE
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1"=700'	5/04
ROUTE:	
BLOKAI ISLAND CONDUIT/FIBER	

LAT NUMBER:  
1 OF 1





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	NEWSON	POSTED BY

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CONDUIT COMPARTMENT  
RELATIVE POSTAGE IN AIRFREIGHT PARCEL POST (10) INDICATES APPROX. POSTAGE (NEARER)



NAME	STANDARD QUANTITY	YEAR OF PLACEMENT
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UD-106(03)		
UD-107(03)		

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**Electronics**




MAILING LIST SERVICES OFFICE  
 SAC CENTRAL OFFICE

SPACE AROUND MESSAGE CHANGES IN  
NUMBER OF WORDS, INDICATES WHETHER THE MESSAGE  
IS A NEW MESSAGE OR A REVISION OF AN EXISTING MESSAGE

**DOUGLAS MERRITT**  
PROFESSOR OF POLITICAL SCIENCE

**FOR THE RECORD**

**RECORDING INDUSTRY ASSOCIATION**

100 N. ZEEB RD.  
ARLINGTON, VA 22202-4392  
TEL: 703/836-6000 FAX: 703/836-6001

**ROUTE 288, BLVD. 100  
AND UNIVERSITY PARK**

**Prepared for:**

100

ISLAND:

PROJECT NO:	EXCHANGE NO:
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FILE NAME	STATEWIDE
FUTURE FINANCES	APPROVED 2/8

FILE NAME: <b>LANAI FIBER</b>	<b>CONSULTANTS</b> HONY SYSTEM (P) 1993-0000
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SCALE: 1"=3200'	DATE DRAWN: 6/04
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ROUTE:  
LANAI ISLAND CONDUIT/FIBER

PLAT NUMBER: 1 OF 1

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[illegible]

PLM1 POC

JUDITH A.

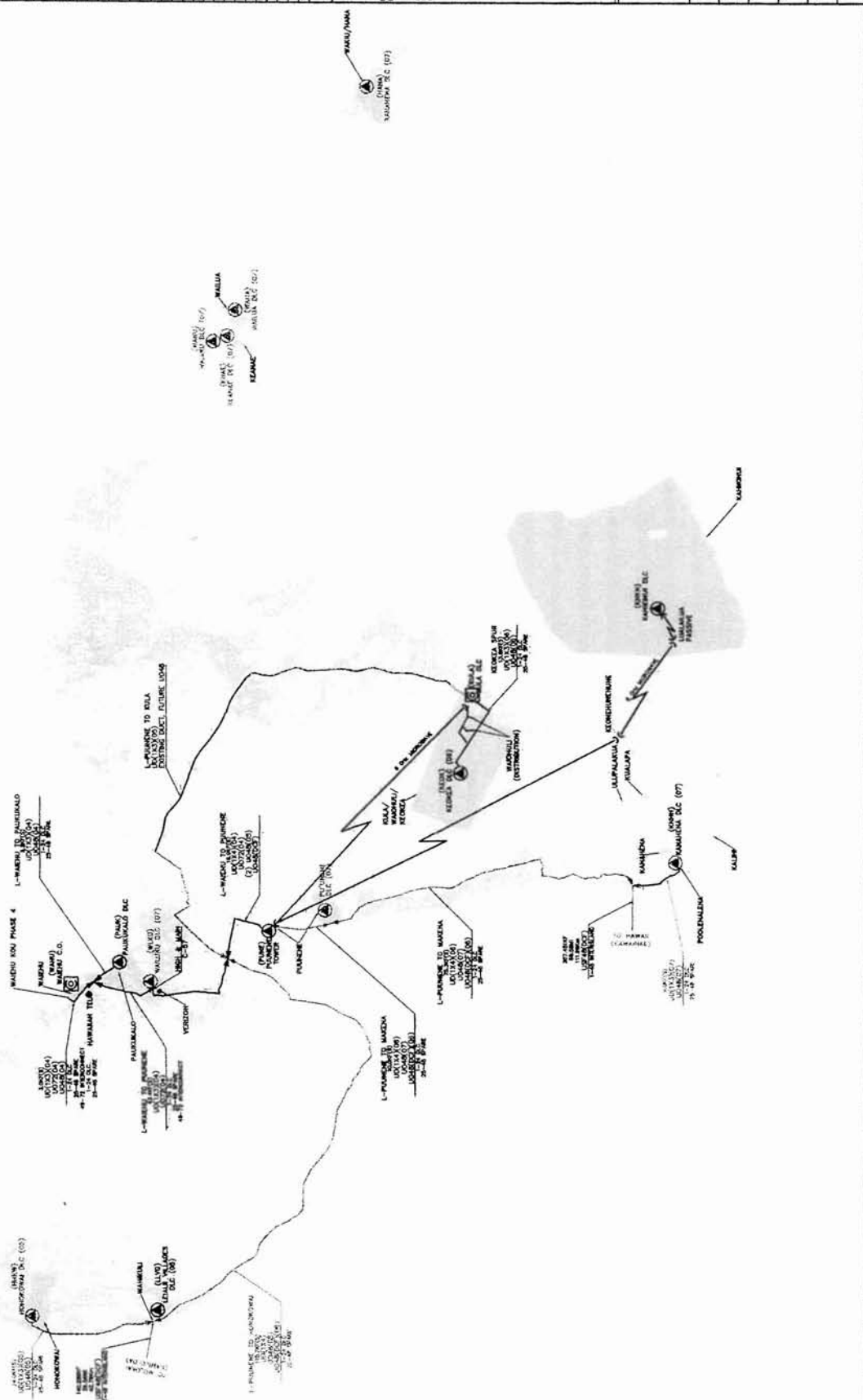
DAY

[illegible][illegible]

**Approved for**

1990-1991

ISLAND:	MAUI
PROJECT NO:	EXCHANGE NO:
FISHING HOLE	STATEWIDE
FILE NAME:	MAUI FIBER
SCALE:	DATE DRAWN:
1"=8400'	6/04
ROUTE:	
MAUI ISLAND CONDUIT/FIBER	
PLAT NUMBER:	1 OF 1







[illegible]

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ROUTE POSTAGE IS GUARANTEED (IN-BOSS POST)  
(X) INDICATES APPROX. POSTAGE (CALCULATED)  
DATE OF PLACEMENT

[illegible]

3044, PROPERTY  
HARSHAW TEL. CENTRAL OFFICE  
INC. CENTRAL OFFICE

SPACE AROUND MODULAR CHANGES IN  
CABLE SIZE, CONSULT SIZE OF ROUTE

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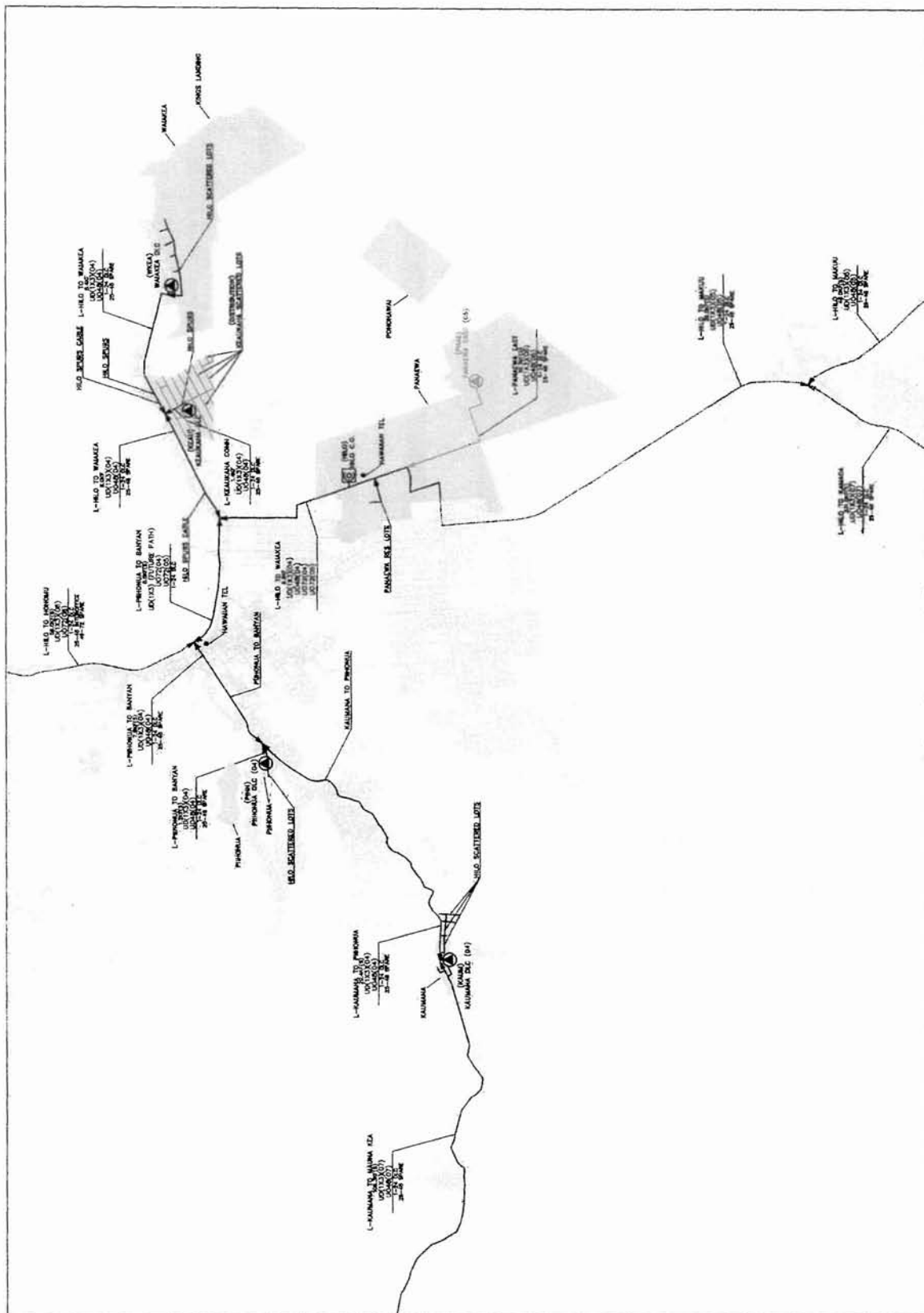
Prepared for  
NORTH WEST MARINE  
AND SUBSEA, SIDA

ISLAND: HAWAII (HILO AREA)

PROJECT NO:	EXCHANGE NO:
FILE NAME:	STATEWIDE

PHILO DETAIL	DATE DRAWN: 4/04	CONSULTANTS NORTH AVENUE (312) 543-0800
SCALE: 1"=2700'		
ROUTE:		

HILO AREA CONDUIT/FIBER	
PLAT NUMBER:	2 OF 3



ISLAND: HAWAII (HILO AREA)

HAWAII (HICO AREA)	
<b>PROJECT NO:</b>	<b>EXCHANGE N</b>
	<b>STA TOWNSHIP</b>

FILE NAME:	STATEWIDE
FILE NAME:	STATEWIDE

HILO DETAIL	BOONVILLE HIGHLAND (SOUTH)
SCALE:	DATE DRAWN

1"=2700'	4/04
ROUTE:	

HILO AREA CONDUIT/FIBER

2 OF 3

